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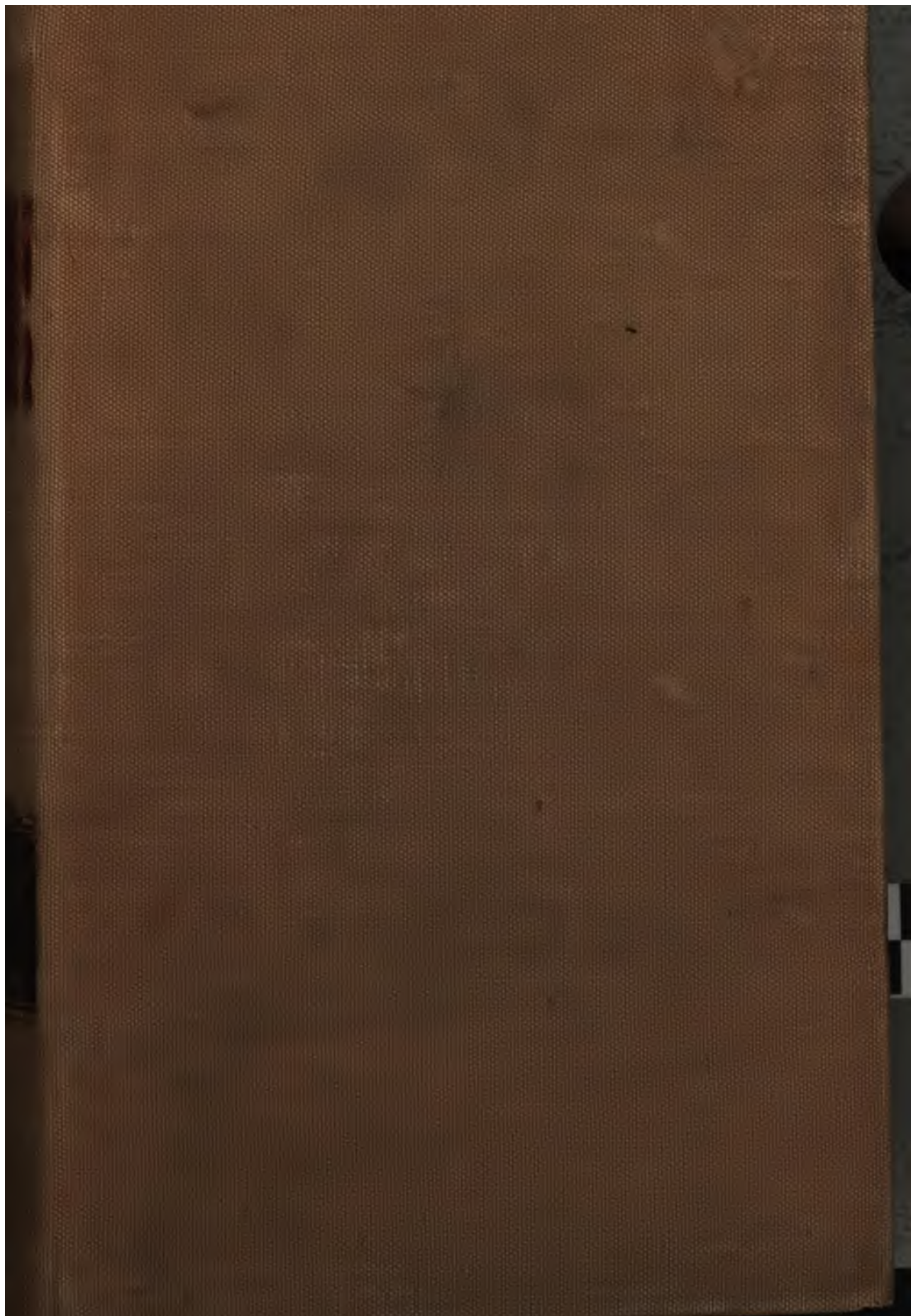
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REPORTS
C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
OF THE
STATE OF NEW YORK.

By **ESEK COWEN,**
Counsellor at Law.

Second Edition.

VOL. VI.



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A

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these sums, at the times mentioned, *Smith* agreed to convey to *Fuller* in fee simple. It was farther agreed, that if the payments were not made at the day, *Smith* might elect to go on with the contract or not. Payments were made by *Fuller* from time to time, to the intestate and the plaintiffs, to the amount of the whole consideration money and interest; the last payment being made to the plaintiffs, on the 12th day of *May*, 1819.

The defendants objected that the plaintiff could not recover on the general counts for money had and received; but the objection was overruled.

They also objected that the plaintiff could not recover till he had shown a deed prepared by him, and tendered to the heirs of *Smith*; and that they had neglected or refused to execute it; or, at least, that a conveyance had been demanded of them, and refused. This objection was overruled.

They also proposed to show that the plaintiff had been in possession of the land since the contract; and had cut and sold timber to a large amount, which, they insisted, should be deducted from the claim of the plaintiff. This was also overruled; and the jury, under the direction of the judge, found for the plaintiff, the amount of the consideration money and interest.

The defendants had pleaded a judgment of \$7000, outstanding against the intestate, recovered in 1815, with a debt upon bond and award, against him; and *plene administravit* except one dollar. To this plea, the plaintiff had replied, praying judgment of assets *quando acciderint*.

G. C. Bronson, for the defendants, moved for a new trial, on the ground; 1. That the plaintiff could not recover on the general counts; but was confined to the special agreement. (*Raymond v. Bearnard*, 12 John. 274. *Clark v. Smith*, 14 John. 326. 1 Chit. Pl. 342. *Towers v. Barrett*, 1 T. R. 133. *Power v. Wells*, Cowp. 818. 4 Mass. Rep. 504. *Weston v. Downes*, Doug. 23. *Hunt v. Silk*, 5 East, 449. *Caswell v. The Black River C. & W. Manufacturing Co.* 14 John. 453. *Taylor v. Hare*, 4 B. & P. 260.

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We submit whether the payment was not a sufficient demand; and whether this, and waiting a reasonable time, would not satisfy the rule, if a demand was necessary.

But if a demand be necessary of the promissor, it is not so of his heirs. The law will not require us to know who they are, or to find them out. There is a privity between them and the administrators; and payment or notice to the latter is equivalent to a payment and notice to the former.

But the property was encumbered with a judgment of \$70,00. This disqualified the promissor and his heirs from conveying; and dispensed with the necessity of a demand, if it had otherwise been necessary. *Seaward v. Willock*, 5 East, 198, 202. *Sugd. L. V.* 164, 5, *Am. ed.* 1820. *Greenby v. Cheever*, 9 John. 126. *Gillet v. Maynard*, 5 John. 87-8. *Judson v. Wass*, 11 John. 527. *Tucker v. Woods*, 12 id. 190. *Duke of St. Albans v. Shore*, 1 H. Bl. 279. *Gazley v. Price*, 16 John. 269. *Ketchum v. Evertson*, 13 id. 364. 2 Chit. Pl. 125, note (i.)

If there could be no performance, the plaintiff had a right to rescind the contract; and recover back the money on the general counts for money had and received.

The offer to show the cutting and conversion of timber was a mere offer to set off damages done by a trespass. We had no right even to enter, till a conveyance; nor, if we had the vendor's consent to enter, could we have cut timber. Our liability sounds in tort. A claim of this sort cannot be set off. (*Duncan v. Lyon*, 3 John. Ch. Rep. 358, and the cases there cited. *Livingston v. Livingston*, 4 id. 292.) An action for use and occupation would not lie. (*Smith v. Stewart*, 6 John. 46.)

Staats v. The Exrs. of Ten Eyck, (3 Caines' Rep. 111, 114,) lays down the true rule, as to the measure of damages. It should be the same as if we had received a conveyance, with covenants, and been ejected for defect of the vendor's title. The measure, then, is the consideration paid, with interest. The cases on this head will be found collected in 2 Wheat. Rep. 63 to 65, note.

We are liable to be ejected by the heirs. Then is the time to liquidate the claim for the mesne profits of the estate. (*Murray v. Gouverneur*, 2 John. Cas. 438.)

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the attachment, on the ground that, as the vendor had not prepared and tendered a conveyance, the defendant was not bound to pay; and the attachment was, therefore, premature; *Pemberton*, for the plaintiff, said, "It is the duty of the purchaser to make and tender a conveyance. The vendor is never called upon to do so." The court denied the motion, thinking it was incumbent on the defendant, "to prepare and tender the conveyance, and pay the purchase money." In *Knight v. Crockford*, (1 *Esp. N. P. Rep.* 190,) on an objection by *Adair*, sergeant, that the plaintiff, a purchaser, could not recover on the contract in question, (which consisted of a promise by the plaintiff to pay for, and of the defendant to convey real estate,) because he had not shown the preparation and tender of a conveyance to the defendant; *Eyre*, C. J. did not question that the objection was according to the general rule; but distinguished the case, saying the defendant had incapacitated himself to convey by selling to another, which rendered a strict performance on the part of the plaintiff unnecessary.

Mr. *Sugden* declares the rule of *Baxter v. Lewis*, to be the settled rule of the profession in *England*; and notwithstanding some *dicta* which he mentions to the contrary, he still infers that the purchaser, and not the vendor, ought to prepare and tender the conveyance. (*Sugd. L. V.* 181-2, *Am. ed.* 1820.) *Sugden* agrees that the contrary was the general rule when the simplicity of the common law reigned, and possession was the best evidence of title; but upon the modifications of estates, unknown to the common law, which resulted in the difficulties surrounding modern titles, the more convenient rule which he mentions had grown up among the conveyancers. (b) This doctrine

(b) The English practice in this particular, will further appear by the following sketches, selected from different parts of *Preston's Essay on Abstracts of Title*, a late *London* publication, in three volumes. I have also extracted a very general outline of the abstract upon which *Preston* treats. I have done so, not only because it is curious, as showing the extensive and laborious duty of the English conveyancer; but because it will not be without use, in suggesting to the New-York lawyer all the heads which can occur in the more simple abstracts of this state.

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purchase money, which he had paid in advance, he must tender the residue, and demand a conveyance. There is, then, something more to be done than the simple payment, or the tender of the purchase money. A conveyance must

is in question, is the more eligible mode, since the deeds were left with the purchaser's solicitor, and they were abstracted at leisure, and he had sufficient time to take care that all the material parts were inserted in the abstract.

It is to be feared, that now, in some instances at least, sufficient time is not allowed, or if allowed, cannot be devoted by the solicitor for the purchaser, to read over and compare the voluminous deeds constituting the evidence of a title, which has experienced a frequent change of ownership, or been fettered by various incumbrances. To understand one deed thoroughly, and all its various operations, combined as they may be with numerous external circumstances, will sometimes engage the attention of those most skilled in the subject, for the greater portion of a day, and require frequent recurrence to the subject before the contents can be perfectly comprehended. What then can be expected from a person who is at once to wade through deeds, wills, &c. which run to the length of several hundred skins, and a short abstract of which alone, comprises from fifty to a hundred pages." (1 *Preston on Abstracts*, 200, 201.)

[*Objects of an abstract.*] "The object of every abstract, is to enable the purchaser, or his counsel, to judge of the evidence deducting the title, and of the incumbrances affecting the title.

Every title involves in itself the question of legal and beneficial ownership.

On the one hand, it is in vain that there is a good title at law, if that title be bad or defective in equity.

On the other hand, it is not sufficient that there is a good title to the legal estate, or to the equitable estate, if it be encumbered with *judgments, legacies, debts to the crown, or other charges*, to its value; for, in proportion to the extent of such incumbrance, will there be a reduction in the actual value of the interest of the vendor.

In short, every abstract should describe whatever will tend to enable a purchaser, or his counsel, to form an opinion of the precise state of the title at law, and in equity, together with all chances of eviction, or even of adverse claims." (1 *Preston on Abstracts*, 41, 2.)

[*Form of the abstract.*] "Every abstract should have a head or title.

This part of the abstract should propound the names of the persons, whose title is to be considered, the estate, or degree of interest they have, and the lands to which the attention is to be directed, and the names of the parishes and county in which the lands are situate; and, as far as practicable, connect the modern with the ancient description of the parcels.

The form may be to this effect:

An abstract of the title of A. B. to the fee simple and inheritance of the manor of in the county of

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he shall not be allowed to retire immediately, and bring his action; but should present himself to receive the conveyance, which he has thus required to be furnished. Deliberation and advice of counsel may be necessary in settling its terms. The framing and execution of modern conveyances, even with us, where the titles to real estate are much less complicated than in England, are not like the payment of money, or the delivery of a chattel. I admit the general rule to be, as contended by the counsel for the plaintiff; that where a party engages to do any act, and a demand is not a part of the contract, the bringing of the action is, in itself, a sufficient demand. Such an important transaction, however, as the assuring of a title to real estate, under the modern system of conveyancing, is an exception to that rule.

Clearly, the judgment recovered against *Smith* is no ground, in a court of law, for rescinding the contract. The agreement was to convey in fee simple. A conveyance is good and perfect, without warranty or personal covenants. Such a conveyance will satisfy the terms of this contract. The judgment is, of itself, no transfer of title. It does not destroy the seisin of *Smith*, or his heirs, nor take away the capacity to convey. (5 *John.* 58. 7 *id.* 380. 13 *id.* 363. 20 *id.* 133. 12 *id.* 443. 9 *id.* 126.)

A new trial must be granted, with costs to abide the event.

New trial granted.

"This may appear to be a duty attended with little or no difficulty; but it will be found to involve within its compass the knowledge of all the rules of real property, and all the niceties with which these rules abound." (*id.*)

"The conveyancer is entitled to be satisfied, not only by an inspection of documental evidence; but verbal information, and even affidavits as to extraneous facts." (*id.* 254).



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were trustees of *Vernon* society ; but they produced no certificate of their having been regularly elected.

On this evidence, the justice gave judgment for the defendant below.

*G. C. Bronson*, for the plaintiffs in error, insisted that none of the irregularities presented by the justice's return, were such a misuser or nonuser as would work a dissolution of the corporation. But if otherwise, it is clear that it did not lie with the defendant to make the objection in the suit before the justice. Though a corporation may forfeit its charter by an abuse or neglect of its franchises, the forfeiture must be ascertained and declared by regular process and judgment of law, before its powers can be taken away, or the corporation be considered as dissolved. The remedy is by *sci. fa.* prosecuted at the instance, and on behalf of the government, or by an information in nature of a *quo warranto*. (1 *Bl. Com.* 485. *Slee v. Bloom*, 5 *John. Ch. Rep.* 366, and the cases there cited. 19 *John. Rep.* 456, 474, *S. C.*) The cases cited show the rule and its exceptions ; and indeed are perfectly conclusive.

The trustees who are duly elected, hold over till others are chosen in their place. (9 *John. Rep.* 147.)

Besides, the defendant contracted with the plaintiffs as a corporation, and by their corporate name, and he is precluded from objecting that they are not a corporation. (14 *John. Rep.* 245.)

*J. A. Spencer*, contra, cited 8 *John. Rep.* 378, to show that the plaintiffs must prove themselves a corporation upon the general issue. He said, no one election had been legally conducted. Only one person had presided at any of them. This was the same as if no election had taken place. The whole was void ; and the plaintiffs not authorized to sue as trustees. (2 *R. L.* 216, s. 3, 6.)

There is no need of a *sci. fa.* or *quo warranto*, to try the question of dissolution, in the case of a religious incorporation under the statute. It must at all times, and in all suits, be prepared to show its continuance as a corporation,

as well as its original formation. Here is not only an irregularity in the election for a single year ; but it was continued for a series of years. The 9 *John.* 147, therefore, is not applicable ; nor will the 14 *John.* 245, be found to help the plaintiffs.

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*Curia*, per SAVAGE, Ch. J. It is settled by the repeated decisions of this court, that when a corporation sues, they are bound, on the general issue, to prove that they are a corporation. (8 *John. Rep.* 378. 14 *id.* 245-6.)

Had the irregularities complained of, been confined to a single year, they would have had no effect upon the plaintiffs' rights, according to the decision in *The People v. Runkel*, (9 *John. Rep.* 147, 149.) It was conceded by the court, in that case, that the trustees, chosen under the act in question, and who go out of office at the end of the year, hold over till others are elected. The question there was, whether an election after the day was good. The court said, "Perhaps the language of the statute is too peremptory, that the seats of one third are to be vacated at the expiration of every year ; but the corporation is not thereby dissolved ; for two thirds of the trustees continue in office." There are cases which hold that where an officer is to be chosen annually, he may hold over after the year until another is chosen, (10 *Mod.* 146 ; *Str.* 625 ; ) and in *The People v. Runkel*, the court said that trustees elected after the day would be in by color of office ; that the election would not be void ; and their acts would be good ; that the corporation would still remain ; and the irregularity, if any, would cure itself in a subsequent year. That reasoning, however, is not applicable to this case. The persons claiming to be a corporation in 1817, when the contract was made with them as such, came into office, if at all, since that period. The same irregularity was continued for three years in succession ; and if it renders the election void, the corporation was dissolved ; or in a situation to be dissolved by appropriate judicial proceedings. For the same reason, the defendant is not estopped to question the plaintiffs' being a corporation by reason of

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his contract with them as such. The estoppel, if any, relates to the time of entering into the contract ; and does not admit that there cannot be a dissolution.

This view of the subject renders it necessary to inquire whether such a nonuser or misuser as is a sufficient ground to produce a forfeiture of corporate rights, can be taken advantage of in this collateral way ; or whether the forfeiture must not first be judicially declared in a direct proceeding by the people.

This point is, I think, settled by the decisions of our own, as well as those of the English courts. In *Slee v. Bloom*, (5 *John. Ch. Rep.* 379, 381,) chancellor *Kent* held that the forfeiture of corporate rights must be judicially ascertained and declared ; and that corporate power which may have been abused or abandoned, cannot be taken away but by regular process. He considers the cases ; and expresses a belief that there is no instance of calling in question the rights of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government.

The decree in *Slee v. Bloom* was reversed in the court for the correction of errors ; not, however, on the ground that the chancellor's position, so far as it related to acts of nonuser or misuser, was incorrect. *Spencer*, Ch. J. who gave the almost unanimous opinion of the court, said, "Upon the authorities and for the reasons given by the chancellor, misuser, or nonuser, cannot be relied on as a substantive and specific ground of dissolution." (b) But the reversal proceeded upon the fact that the corporation in question had surrendered, or done what was equivalent to a surrender of their corporate rights.

These cases seem to me conclusive against allowing the objection, coming, as it does, collaterally, that this corporation was dissolved. There is nothing in the statute showing that the legislature considered religious incorporations as standing on a different footing in this respect from other corporate bodies.

(b) And vid. *Silver Lake Bank v. North*, (4 *John. Ch. Rep.* 373,) per *Kent*, chancellor.

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*Chitty* and *Phillips* lay down the same doctrine. The same thing was held by this court in 1794. The decision is mentioned by *Kent*, Ch. J. in *The People v. Howell*, (4 *John. Rep.* 296, 302.) The chief justice there questions the soundness of the rule; but declares there was no necessity for interfering with it in that case; and that the court did not interfere with it.

I am aware that the rule has been questioned, and indeed overruled in other states; but those decisions are not binding here. The question with us should be, what is the common law of *England*? Our constitution has expressly adopted that law. It is as binding upon the court as if the legislature had passed an act declaring that the English rule in this particular case should be our rule. The highest evidence of the common law is the English cases.

I know the reason of the rule may be questioned. English judges themselves have admitted it to be an anomaly in the law of evidence; but it is enough for us in a criminal case to show what the rule is. It must continue till altered by the legislature.

Nor is it entirely destitute of reason. Suppose a trial of an indictment for the forgery of the maker's name to a note, which is believed by all the witnesses, except the maker, to be genuine. He is then called. If he admits its genuineness, what he says would be evidence against him, on a private suit for the money. In this view, he would be interested to deny his signature, in order to escape the effect of swearing true. It is well, where crimes of this high nature are in question, to avoid even a temptation to perjury against the criminal.

*Talcott*, (A. G.) contra. There was a time when the rules of evidence were so strict that the person sought to be injured either by usury, perjury or forgery, was an incompetent witness to prove the crime. This arose from confounding an interest in the question, with an interest in the event of the cause. The cases of *Bent v. Baker*, (3 *T. R.* 27,) and *Abrahams v. Bunn*, (4 *Burr.* 2251,) placed the doctrine of interest on its true footing; and since

that time, to exclude a witness for this cause, he must be interested in the event of the suit. In general, to exclude him, it must appear that the record in the suit wherein he is called to testify, will be evidence for or against him; otherwise he neither gains nor loses any thing by the event. After this rule was established, it was, as remarked by the prisoner's counsel, agreed by English judges, that the doctrine which he contends for was an anomaly, not justified by principle; yet it was obstinately adhered to. But if all the cases except those relating to the point before the court, have been made to square with the more enlightened rule; if all cases to the contrary, except those now in question, have been overruled, (see 4 *Burr.* 2251, 4 *East*, 572,) why not overrule these also? Such a step is justified by the same reasons upon which the other cases were disregarded, and considered no longer binding.

There may be one reason for the exception in *England* which has no existence here. In many cases, the instrument forged, is forfeited to the crown; the party who would otherwise be benefited by it loses all interest; nor can the crown sue upon it, because the very record through which it must derive its interest shows the forgery. In all other cases the instrument is impounded by the court; and the party cannot reach it. (2 *East's P. C.* 994.) *Evans* remarks, in his commentary on *Pothier*, "I have heard a learned judge assign a reason for not admitting a person whose name is forged to an instrument, purporting to subject him to an obligation, viz. that though the crown acquires a right, by forfeiture, to the goods of the offender, it may not be allowed to set up such a right in respect of the particular obligation, which, by the same record that is necessary to the title, is found to be a forgery." (2 *Ev. Polh.* 316.) In *Commonwealth v. Snell*, (3 *Mass. Rep.* 82,) the English cases have been overruled. *Parsons*, C. J. said in that case, that "formerly, both in civil and criminal prosecutions, the witness was held to be incompetent, if he was interested in the question; that in *England*, since Lord Chief Justice *Parker's* time, the rule had been altered; and no witness was now excluded from

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testifying by reason of any supposed interest, unless he was interested in the event of the suit, or unless the verdict in the cause, whichever way it may be found, could be given in evidence in any other action, in which he was a party ; that in *England*, the party whose name is said to be forged cannot now be a witness ; for he is considered as interested ; because, if the instrument is found by the verdict to be a forgery, it is impounded by the court ; so that it cannot again be used as evidence." (*id.* 84.) The courts in *Pennsylvania* hold the same doctrine. (*Respublica v. Ross*, 2 *Dall.* 239.)

True, in 1794, this court did hold with the English cases ; but that decision was afterwards questioned by *Kent*, C. J. in *The People v. Howell*, (4 *John. Rep.* 302 ; ) and the courts of oyer and terminer have since been in the uniform practice, I understand, of admitting the witness whose name has been forged.

[WOODWORTH, J. I have known this to be so in several cases at the oyer and terminer ; and its propriety was not drawn in question.]

As to the temptation to perjury from fear that an admission of the hand writing may be given in evidence against the witness in a private prosecution ; the argument proves too much. It would go to render witnesses incompetent in thousands of cases, where their competency was never thought of being questioned.

So far as the true principles of evidence are in question, there is no doubt. That principle is sanctioned by many cases, and indeed is not denied ; and it will be always found that one good principle is worth a hundred precedents. The court are called on, not to overrule, but return to the law. I should be sorry to suppose there is any thing either in the constitution or common law, which will prevent their doing so.

*Stevens*, in reply, said he was not aware that in *England* the forged instrument was ever considered as forfeited to the king. He did not believe that it came within the doc-

trine of deodands. If this be so, why did the learned men of that country agree in styling the doctrine for which he contended an anomaly? In truth, if this were as contended by the attorney-general, the witness would have the highest interest. To impound the instrument was also a very ancient practice; and has not prevailed in *England* for many years. The question has been considered entirely unembarrassed with either of these difficulties. The reason of the rule is the same on both sides of the Atlantic.

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*Curia*, per SAVAGE, Ch. Justice. There has been a difference upon the point presented by this case between the English and American decisions; the former holding that the party whose name has been forged to an instrument, cannot be a witness against the offender; and the latter that he may. Although this court, in 1794, decided according to the English cases; yet the reasoning of *Kent*, Ch. J. in *The People v. Howell*, has generally been considered by the profession as satisfactory; and it has, as far as we can learn, been followed in practice, at the courts of oyer and terminer. Besides, if we pass from the conflict of decision and practice on the subject, we find a principle long and well established, and so fully embracing the point, that the English judges, when this question has come before them, acknowledge their own course to be a mere anomaly in the law of evidence. (4 *East*, 582.) That principle is, that whenever the witness cannot possibly derive any benefit or sustain any loss from the event of the cause, he is competent. To this rule, even in *England*, the point in question forms a solitary exception, for which no reason can be given. (*Vid.* 4 *East*, 582.) Why every other case should have been brought to that test, and this alone form an exception, is not explained, except upon the foundation of precedent. Yet the precedents are not so old as to deny us the power of seeing how they arose; or that their reason and foundation have been overruled.

These passing away, it is certainly warrantable to dismiss the superstructure with them.

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We are accordingly of opinion that the court below decided correctly.

The prisoner was sentenced to the *Auburn* state prison for 10 years.

Rule accordingly. (a)

(a) The English doctrine seems to prevail in *Vermont*, (*State v. A. W. 1 Tyler*, 260,) and *Connecticut* (*State v. Brunson*, 1 *Root*, 307; *id. v. Howard*, *id.* 308; *id. v. Blodget*, *id.* 534.)

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ALLEN *against* CALHOUN and OTHERS.

The supreme court will not interfere with the practice of the circuit judge, as to the correction of his calendar.

*It seems, a cause should be placed there, according to the date of the oldest issue in it.*

*L. Beardsley* moved to set aside the inquest taken against the defendants, at the last *Otsego* circuit, on the ground, (among others,) that though the notice of trial for the circuit was not for an inquest; yet an inquest was taken by the plaintiff out of its order on the calendar. There were issues of different dates in the cause; the first was the general issue; and the others were joined, at a later period, by replication to the defendant's special pleas. The cause stood on the calendar as of the last date; but on motion of the plaintiff's counsel, on the third day of the circuit, it was raised to the date of the first, by order of the circuit judge; called as of that date, and an inquest taken.

*J. Brackett* and *A. Stewart*, contra.

*Curia.* The correction of the circuit calendar belongs exclusively to the judge; nor will we interfere with his rules of practice on this head. Besides, he proceeded on the same principle which we have adopted in the correction of our own calendar. (*Griswold v. Stewart*, 3 *Coven*, 16.) There is, however, an affidavit of merits; and the defendants may take their motion on payment of costs; they having accounted for not appearing at the trial.

Rule accordingly.

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Satterlee  
v.  
Groot.

SATTERLEE *against* GROOT.

*S. W. Jones*, for the defendant, moved to change the venue from *Albany* to *Schenectady*.

He read an affidavit of the defendant, that he had thirteen witnesses residing in *Schenectady*, whose testimony, as he was advised by counsel and verily believed, would be material to his defence ; but he did not add that, *as he was advised by counsel and believed, he could not safely proceed to trial without their testimony ; and therefore,*

*J. L. Wendell*, contra, objected that the affidavit was defective.

*Curia.* The point has not been before raised ; and the practice has been different. There is often a very great laxity of swearing upon these motions ; and the party should certainly be holden to express himself clearly. That the witnesses are *material*, implies perhaps that the party cannot safely proceed without them ; but the expression may be considered equivocal by the party. That witnesses residing in the county to which the venue is sought to be changed, know of a material fact, is not enough. A dozen witnesses residing in the county where the venue is laid, may know the same thing ; and be more easily reached than those in the other county ; and yet, in one sense, the testimony of these may be said to be material. But it would be no ground for a change of venue. The witnesses intended are such that the party cannot safely go to trial without their testimony ; and he should swear to this under the advice of counsel. The motion must, therefore, be denied, for the defect of the affidavit ; but as the point has not been before decided, this must be without costs.

The affidavit for a change of venue should state, that the witnesses, on account of whose place of residence the venue is sought to be changed, are such that, under the advice of counsel, the party cannot safely proceed to trial without them.

Motion denied.

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Brewster  
v.  
Bostwick.

BREWSTER and BOSTWICK *against* HALL and OTHERS.

A special plea, under the statute of double pleading, though it be an ordinary plea, and good on its face; if it be sworn to be altogether false, in fact, by the plaintiff and not pretended to be true, by the defendant, or his attorney, will be set aside on motion, even after replication, demurrer and joinder; and after the plaintiff's attorney has placed it on the calendar for argument; and even after the cause has been tried upon the general issue.

IN assumpsit. *J. Dickson*, for the plaintiffs, moved to set aside three special pleas interposed by the defendants. The first was a plea of accord and satisfaction, in nearly the common form. The second was, that the parties had stated an account, when a balance was found for the plaintiffs of \$700,99; for which the defendants gave their bond, as security; that the plaintiffs had recovered judgment thereon; that one of the defendants paid the judgment in full, &c. These facts were pleaded with great particularity of day, place and circumstance. The third plea was a very formal plea, first of a special accord between the parties; and a formal and particular satisfaction in pursuance of it.

These had been pleaded, according to the statute, &c. with the general issue. The plaintiffs had replied to the special pleas, taking issue to the country; and the defendants had demurred to the replication; and the plaintiffs joined in demurrer. At the last *Monroe* circuit, the plaintiffs took an inquest, pursuant to notice for that purpose, no affidavit of merits having been filed by the defendants.

The plaintiffs' attorney had also placed the demurrers on the calendar of the present term for argument.

The counsel read an affidavit, of one of the plaintiffs, showing the falsity of the special pleas in point of fact; and this was not denied in any way by the defendants, or their attorney. He cited 2 *B. & A.* 197, 199; 5 *id.* 750; 2 *Coven.* 634, and 637, note (a.)

*R. M. Morrison* and *G. C. Bronson*, contra, said the court would not interfere in this form, merely because the pleas were untrue in point of fact. (4 *Coven.* 47-8, and note.) Beside, it is now too late to move; the plaintiffs having replied to the pleas, and joined in demurrer to the replications. They must now be argued.

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made an ordinary plea of accord and satisfaction, it appearing plainly to be false. The earlier cases were cited by judge Platt, the counsel who moved in *Steward v. Hutchins*, (2 Cinnen's Rep. 637.) The following cases upon this point are reported in 5 B. & A. 750 and note (a): In *Shudwell v. Berthoud*, to an action on a bill of exchange, the defendant pleaded that the plaintiff was indebted to him in a large sum on a recognizance in the exchequer; and the court ordered it stricken out, on the ground that it was obviously intended to gain time, and the attorney would be obliged to consult counsel. In *Body v. Johnson*, the defendant pleaded as to one third of the plaintiff's demand, a bond to another; a set-off to one third, and to the residue that he had given a promissory note; and the plaintiff had judgment as for want of a plea. *Corbet v. Porrell* was debt by an executor on a bond. Plea, that the bond had been assigned and paid to the assignee; replication and issue. The defendant struck out the similitur, and demurred to the replication. The court interfered even at this late stage of the pleading, and gave judgment as for want of a plea.

The last case furnishes an answer to the objection that taking issue on the plea is a waiver of the motion to strike out. We think this may be done at any time, before the plea is disposed of in the ordinary way, by trial or on demurrer.

In *Morgan v. Roder*, (3 B. & C. 81,) the authority of *Body v. Johnson* is questioned; and the court refused to set aside the plea. It does not appear what it was.

Thus it will be seen that the English cases do not entirely agree as to the kind of pleas which the court will strike out. They do all agree that the plea must be without pretence in point of fact; but when we come to its legal nature, we find precedents for setting aside both those which are plainly good; and others of a doubtful validity. Sometimes the criterion is delay and expense; and sometimes ingenuity and delusion. In truth, perhaps, no general rule can be laid down on the subject. Courts have never yet

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Jackson  
v.  
Sackett.

JACKSON, *ex dem.* ABEL, *against* MILLER.

The supreme court will not order a case to be referred to a circuit judge for settlement as to the evidence, where it has once been settled by him according to the practice of the court; unless there be a very plain mistake.

*J. L. Fiele*, for the defendant, moved that a case made for the purpose of moving for a new trial in this cause, and which had been settled by the circuit judge who tried the cause, be again referred to him for re-settlement. The motion was founded on affidavits of the defendant's counsel, and of witnesses sworn at the trial, that, according to their recollection, some of the testimony given at the trial had been mistaken by the judge.

*E. Cowen*, contra, produced affidavits of the plaintiff's counsel, that, according to their recollection, the evidence was correctly stated by the judge.

*Curia.* Where the testimony in a case has been settled by a circuit judge, according to the practice of this court, we will not examine its accuracy on affidavit; and order it referred for correction, unless there be a very plain mistake. He hears witnesses, and takes minutes of their testimony, which he has before him; and is, therefore, more competent to settle the testimony than this court. The motion must be denied.

Motion denied.

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JACKSON, *ex dem.* DEMONT, *against* SACKETT and DAVIS.

To warrant an attachment for not paying costs pursuant to a rule of court, where the costs are not demanded by the party entitled to them, or his attorney, the power to demand them should be exhibited to the party of whom they are demanded.

*T. Mumford* moved for an attachment against the defendants for not paying costs, pursuant to a rule of this court. The costs had been demanded of the defendants by Mr. C. pursuant to a power of attorney from Mr. M. the attorney for the plaintiff; but it did not appear in the affidavit for the motion that Mr. C. had exhibited his power to demand them should be exhibited to the party of whom they are demanded.

er to the defendants, to make the demand; and, on this ground,

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*L. F. Stevens* opposed the motion.

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v.  
Smith.

*Mumford* said, it lay with the defendants to object the want of a power at the time, and demand an exhibition of it; otherwise they waived its production.

*Curia.* We think otherwise. You must show the defendants to be in contempt. For this purpose you are required to exhibit the original rule. It is still more important that the power should be shown. In most cases, parties have knowledge of the rule taken against them; or may, at least, obtain knowledge of it by searching the minutes of court. The power is a private document, the knowledge of which lies between the attorney and his agent. The uniform practice has been to require its exhibition. The motion must be denied.

Motion denied.

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JACKSON, *ex dem.* ABBY, against SMITH.

UPON a mere notice, unfounded on any affidavit, or other papers, a motion was made to amend the declaration by adding a new demise particularly specified in the notice; and *Anonymous*, (2 *Caines*, 261,) was cited.

Leave to amend a declaration in ejectment by adding a new demise, will not be given on a mere notice of motion, without any cause shown by affidavit.

*W. D. Ford*, for the motion.

*E. C. Reed*, contra.

*Curia.* The motion must be denied. The case cited from *Caines* has not been followed in practice. Without proof of the fact, we cannot see the necessity of the amendment; nor even that there is any action pending. Great liberality prevails in allowing these amendments; but they are not merely of course. If so, why not enter a common rule? Some reason for applying to the court should be



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v.  
Yates.

shown by affidavit, or otherwise. The question of amendment is one of discretion, depending on various circumstances. That the person from whom the demise is sought to be added, has a subsisting claim to the premises, or some other substantial reason, is usually required to be shown; and there are several cases in which we have refused the amendment for want of this. (*Jackson v. Richmond*, 4 *John. Rep.* 483. *Jackson v. Murray*, 1 *Coxe's Rep.* 156.) The motion must be denied.

Motion denied.

#### SEEBER against YATES.

Where, on a judgment by default, on a declaration upon a promissory note, with the money counts, the plaintiff had caused the damages to be assessed by the clerk, and taken final judgment without entering a *nolle prosequi* as to the money counts; on a motion to set aside the judgment and subsequent proceedings, he was allowed to amend on payment of costs, by then entering a *nolle prosequi*; and the motion to set aside the judgment was denied.

THE declaration, containing the money counts, with a count on a promissory note, the plaintiff's attorney had, after a judgment by default, inadvertently caused the damages to be assessed by the clerk on the note without first entering a *nolle prosequi* as to the money counts; and taken his final judgment and execution.

On this ground, it was now moved, in behalf of the defendant, that the judgment and subsequent proceedings should be set aside for irregularity.

For the plaintiff, it was moved that he might now enter a *nolle prosequi* as to the money counts; and having thus amended, retain his judgment and execution.

D. Eacker, for the motion.

N. N. Farn Allstine, contra.

Curia. The plaintiff may amend, on paying the costs of the defendant's motion; upon which his motion shall be refused.

Rule accordingly.

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Aug. 1326.

The People  
v.  
Brown.

ANONYMOUS.

ON motion that an argument take preference on the calendar ;

The Court decided that a suit upon a policy of insurance against an incorporated insurance company, was not entitled to preference within the 4th section of the "Act to prevent fraudulent bankruptcies by incorporated companies," &c. passed April 21, 1825, (*sess.* 48, *ch.* 325;) a policy not being a contract, note or other evidence of debt, within the meaning of the statute. They said it meant some instrument which is, in itself, evidence of debt ; as a note, bill of exchange or bond, &c.

A suit on a policy against an incorporated insurance company, not entitled to preference, within the statute, (*sess.* 48, *ch.* 325. s. 4.)

THE PEOPLE *against* BROWN, late sheriff of Schoharie.

THE defendant being brought up on attachment for not returning a *fi. fa.*, in answer to the interrogatories filed, said that the *fi. fa.* had been received by his under sheriff ; and that the money had been collected ; and that he had not returned the execution ; but did not say, whether he had received notice of a rule to make the return ; and the attorney for the plaintiffs had inadvertently omitted an interrogatory to that point.

Interrogatories, filed on the return of an attachment amended by inserting an additional interrogatory.

Jas. Edwards, for the plaintiffs, moved to amend by inserting this interrogatory.

The sheriff is liable to an attachment for not returning process pursuant to a rule ; though it never came to his own hands ; but only to the hands of his deputy.

M. T. Reynolds, contra, insisted that the amendment was not admissible ; but

The Court allowed it.

This being made, the defendant admitted notice of a rule to return the *fi. fa.* But then,

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v.  
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*Reynolds* submitted whether he should not be discharged, on the ground that the execution and the money collected had not come to his own hands; but the hands of his under sheriff. And he cited *The People v. Waters*, (1 *John. Cas.* 137; *Col. Cas.* 76, *S. C.*; *The People v. Gilliland*, 7 *John. Rep.* 555.) But

*The Court* agreed that this was no objection. They said the remedy by attachment, although in form a criminal, was in truth but a civil proceeding; and the sheriff was liable for the act of his deputy, the same as in a civil action; that *The People v. Gilliland* went upon the very great delay, and the death of the deputy. The case cited from *Johnson's* and *Coleman's* cases, has not been followed. The court look to the sheriff. They do not know the deputy in this, and the like proceedings. The sheriff must stand committed, till the money and costs are paid.

Rule accordingly.

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JACKSON, *ex. dem.* WELLS and OTHERS *against* BREESE.

**EJECTMENT.** Verdict and judgment for the plaintiff. Where a cause goes off at the circuit, because the plaintiff is not ready, he cannot recover the costs of that circuit, though he finally succeed in the cause. The cause had been noticed for trial twice. On the first notice, the plaintiff not being ready at the circuit, the cause went off for that reason. The plaintiff's attorney insisted on having his costs of that circuit taxed in the final bill; and that they should make a part of the judgment; but

*Storrs*, first judge of *Oneida*, before whom the taxation took place, excluded them.

*T. E. Clarke*, therefore, moved for a retaxation.

*J. Platt*, contra.

*Curia.* Judge *Storrs* was right in disallowing these costs. Where a cause goes off at the circuit, because the

plaintiff is not ready, he cannot recover his costs of that circuit, though he is finally successful; and so we have often decided.

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Aug. 1836.

Ex parte  
Fort.

Motion denied.

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*Ex parte Fort.*

J. A. Spencer, moved for a mandamus to the C. P. of Madison county, commanding them to vacate a rule allowing *Ratmour* and *Smalley*, defendants in replevin, in that court, at the suit of *Fort*, to file a plaint *nunc pro tunc*. The facts were, that the clerk of *Fort's* attorney had made out and delivered a plaint in replevin to the sheriff of Madison, against *Ratmour* and *Smalley*; which was executed. But the attorney, on the fact coming to his knowledge, being satisfied that the action would not lie, withdrew the plaint; and it was never returned. The attorney for *Ratmour* and *Smalley*, however, entered their appearance and proceeded to *non pros* the plaintiff. Whereupon, *Fort* brought error to this court; and assigned, among other errors, diminution in the want of a plaint in the C. P. The attorney of *Ratmour* and *Smalley* applied to the C. P. who granted them leave to file a proper plaint *nunc pro tunc*; so that *Fort's* writ of error would be defeated in this respect.

The defendant may non pros the plaintiff in replevin, tho' the plaint has not been returned, especially where it is withdrawn by the plaintiff from the sheriff's hands.

And to support the proceedings, even after error brought, the court may allow the defendant to file a plaint *nunc pro tunc*.

*Spencer*, insisted that the plaintiff had a right to withdraw the plaint. The only consequence was, that he forfeited the bond which he had given, to prosecute the suit with effect. Until the plaint was returned, and the plaintiff appeared, the defendants could not *non pros* him; but should have taken their remedy upon the bond. (2 *Archb. Pr.* 64. 1 *B. & P.* 410.) The right to *non pros* both in *England* and this state, depends on statute; in *England*, on 13 *Car. 2. St. 2, c. 2, s. 3.* (1 *Tidd*, 412.) Under that statute, the defendant may appear and *non pros* the

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Ex parte
Stafford.

plaintiff, though the process be not returned. (*id.* 413. 7 *Mod.* 32.) But it will be seen that our statute on the same subject, (1 *R. L.* 345, *s.* 11,) differs from the English. It requires the return of the process.

S. Chapman and *A. Stewart*, contra, cited *Col.* and *Cain. Cas.* 61 ; 1 *Archb. Pr.* 228, 9.

Curia. The statute (1 *R. L.* 91, *s.* 1,) makes it the duty of the sheriff to return the plaint to the next court of common pleas. It is, in this respect, like any other process in his hands. Now, whether the plaintiff had a right, in this case to withdraw the process or not, we think the common pleas were correct in the rule which they made. The defendant should not be deprived of his *non pros* by the act of the plaintiff in withdrawing the process. It is served. The defendant's duty to himself, requires that he should defend his rights. He retains an attorney, incurs expense ; and his only remedy for his costs, in ordinary cases, is by *non pros*. He has, we think, the same remedy in replevin. If, as insisted by the counsel for the relator, it is necessary that the process be actually returned, to warrant the *non pros*, this, of itself, shows the importance of allowing process to be filed *nunc pro tunc*, in order that the proceedings may be sustained in point of form. And more especially where the process is withheld from the files by the plaintiff.

The motion must be denied.

Motion denied.

Ex parte STAFFORD.

An appeal lies from the judgment of a justice in favor of the plaintiff, where an issue is joined ; though the defendant do not appear, and take no part in the trial. STAFFORD sued *Faniham* before a justice of *Madison* county. He declared ; and *Faniham* pleaded the general issue. The cause was then adjourned. The defendant

did not appear at the adjourned day ; when the justice heard the cause, and gave judgment for *Stafford*. *Faniham* appealed to the *Madison* common pleas. On a motion before them in behalf of *Stafford* to quash the appeal, on the ground that, there having been no trial before the justice, a certiorari, not an appeal, was the proper remedy, they denied the motion.

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Prescott
v.
Roberts.

J. A. Spencer, now moved, (*ex parte*,) for an alternative mandamus, commanding them to quash the appeal ; and cited laws of 1824, *sess.* 47, *ch.* 238, *p.* 294, *s.* 36, and *Harwood v. French*, (4 *Coven*, 501.)

The motion was not opposed ; but

Per Curiam. The case cited was one in which no issue was joined. If an issue is joined, there must be a trial before judgment can be rendered for the plaintiff ; though it may be *ex parte*, and like an inquest at the circuit. It is not the less a trial of the cause, within the words of the statute, because it is not actually contested, and witnesses sworn on both sides. It does not alter its character, whether the defendant be present or absent.

The motion must be denied.

Motion denied.

PRESCOTT against ROBERTS, impleaded with *Hibbard*.

THE venue in this cause was at first laid in the county of *Onondaga* ; and was noticed for trial and inquest there, at the last *March* circuit. To prevent an inquest, and put the plaintiff to the regular course of the calendar, the defendant filed with the circuit clerk the usual affidavit of merits ; and served a copy on the plaintiff's attorney. The cause not being then tried, the venue was changed to the county of *Rensselaer*, by stipulation between the par-

One affidavit of merits to prevent an inquest is sufficient, though the cause be several times noticed for trial and inquest. And if filed and served on the plaintiff's attorney, for

a circuit in one county, it is sufficient, though the venue be afterwards changed to another county, and the cause be tried in the latter.

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v.
Thorp.

ties. The plaintiff then noticed the cause for trial and inquest, at the last *June* circuit in *Rensselaer*, when an inquest was taken against the defendant in the cause out of its order on the calendar ; no new affidavit of merits being filed and served by the defendant, in order to prevent this.

A motion was now made, on the part of the defendant, to set aside that inquest, and all subsequent proceedings, for irregularity ; and 6 *John. Rep.* 19, 2 *Dunl. Pract.* 686, and 4 *Cowen*, 539, 540, were cited in support of the motion.

J. Watson, for the motion.

J. Fleming, jun. contra.

Curia. We held, (4 *Cowen*, 540,) that a single affidavit of merits extends throughout the whole progress of the cause ; that there is no need of one at every circuit at which the cause may be noticed. This was, however, of a cause where there had been no change of venue. The affidavit filed at *Onondaga* was not notice to the circuit judge at *Rensselaer* ; but it was notice to the attorney for the plaintiff. This was enough. A change of venue does not vary the principle. The motion must be granted. But as the precise point has not before been decided, we grant the motion without costs.

Motion granted.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE NEW-JERSEY PROTECTION AND LOMBARD BANK *against* THORP.

A foreign THE plaintiffs were incorporated by an act of the legislature of *New-Jersey*, reserving the right to appeal or may sue in this court.

And where, after suit commenced, the act of incorporation was repealed, and the property of the corporation vested in trustees who were authorized to sue, and be substituted for the corporation in suits brought ; on motion, the trustees were made parties to the suit, instead of the corporation.

modify the act at any time. The plaintiffs sued in this court for a debt due to them. Afterwards the legislature of *New-Jersey* repealed their charter, and passed a law vesting all the property of the corporation in three trustees. This last act was passed *November 23d*, 1825 ; and afterwards, in *December* of the same year, the legislature passed a supplemental act, authorizing the trustees to maintain suits in their own names as trustees ; and providing that they should be substituted for the plaintiffs in suits before commenced in the name of the plaintiffs.

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Aug. 1828.
Lombard
Bank
v.
Thorp.

P. W. Radcliff moved that these trustees be substituted in this suit accordingly. He cited 4 *John. Ch. Rep.* 370, 372, and the cases there cited.

D. Selden, contra, cited 1 *Bl. Com.* 512 ; *id.* 311 ; 2 *Kyd on Corp.* 516 ; 3 *Ves.* 429, 435 ; 10 *Ves.* 352 ; 8 *Wheat.* 488 ; 3 *T. R.* 727 ; 1 *H. Bl.* 123 ; 3 *Cranch*, 319.

Curia. It was very properly conceded on the argument, by the counsel for the defendant, that foreign corporations may sue here. Nothing is better settled. (4 *Cowen*, 529, note, and cases there cited.) Is this case, then, distinguishable in principle ? We think not. The act does not interfere with an existing remedy of our own. It was likened to the case of the assignees of foreign bankrupts, who, as it is held by some cases, cannot sue here. (*Vid.* 4 *Cowen*, 530, note, and cases there cited.) But the cases are not similar. Though bankrupt assignments are sanctioned by statute, they have been regarded in the light of voluntary assignments ; and when they relate to choses in action, we may apply our own remedies ; holding that the suit must still be in the name of the original creditor. These trustees are a *quasi* corporation ; and come directly within the rule which gives an action here in favor of a foreign corporation.

Motion granted.

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Aug. 1836.

Roosevelt
v.
Fulton

ROOSEVELT *against* FULTON AND OTHERS, heirs of *Fulton*.

Matters properly inserted in a bill of exceptions, cannot be heard on non-enumerated motion; e. g. an objection that the plaintiff was proceeding in defiance of an injunction from the court of chancery.

On a plea of *riens per discent*, the venire need not be special.

Tho' there be several issues of fact the venire need not be special.

The venire *sem quon* applies only where there is a demurrer or default, as well as an issue of fact.

In covenant against the defendants, they pleaded *non infregit conventionem*, and *riens per discent*. To the latter plea the plaintiff replied that the defendants had sufficient lands by descent, &c. and issue. The award of the venire on the roll was in the common general form; and the venire itself was in the same form; commanding the sheriff to summon 12, &c. to make a jury, &c. between the parties in a plea of covenant, &c. without referring to the plea of *riens per discent*, or expressing the purpose to inquire into the value of the lands descended, according to the statute, (1 R. L. 317, s. 4.) An objection was made to the venire at the circuit, as irregular on that account; but the judge overruled the objection; nor was the value of the lands inquired of by the jury.

Several other objections were made by the defendant in the course of the trial; and among others that the plaintiff was going on with the trial in violation of an injunction which had issued from the court of chancery, enjoining him not to proceed against the defendants as to part of the moneys which he claimed in this suit; and it was insisted that the plaintiff should not be allowed to claim before the jury the moneys thus enjoined; but the judge overruled the objections; and the defendants excepted. The bill of exceptions was settled, and the cause placed upon the calendar for argument upon that bill.

C. Graham, now moved to set aside the verdict for irregularity; and cited 1 Archb. Pr. 156, 159; 1 R. L. 317; 2 Archb. Pr. 136-7; 1 Wentw. Pl. 43; 2 Saund. 7, note.

J. I. Roosevelt, contra, cited Mitf. 208; 2 John. Rep. 24, 181; Phil. Ev. 226; 1 Munf. 437; 3 Cowen. 622; Coop. Plead. 269; Mitf. 194; 1 John. Rep. 287; Gilb. Ev. 28; Bull. N. P. 232; 1 Munf. 394, 403; Phil. Ev. 231; Hardr. 472; Rep. temp. Holt, 134; 3 Mod. 141; 3

East, 365; 18 *John*. 352; 5 *Mass. Rep.* 181-2; *Mitf.* 193; 1 *Esp. Rep.* 43; 4 *John. Ch. Rep.* 619; 1 *Ch. Pl.* 459; 7 *East*, 153; 8 *id.* 344; 10 *id.* 377; 2 *id.* 442; 4 *id.* 311; *Tidd*, 1022; 2 *Campb. Rep.* 396; 10 *East*, 38; 16 *id.* 39; 1 *Phil. Ev.* 237; 13 *John.* 139; 1 *John. Cas.* 436; 4 *John. Rep.* 510; 1 *Archb.* 159.

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v.  
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*Curia.* The questions properly in the bill of exceptions can not be heard now. The only point which we can decide on non-enumerated motion, is, whether the venire was regular, being in the general form; and we think it was. Because a jury are required by law to find any matter specially, it does not follow that the venire should contain that matter. Wherever there is an issue or issues of fact, the venire is general, "to make a jury between the parties, in such a plea, because they have put themselves upon that jury." This reaches every case except the single one cited from *Archbold* by the counsel, where there is a demurrer or default as well as an issue of fact. There the venire cannot say, generally, the parties have put themselves on a jury. This is only true of part. Hence the *venire tamquam*, which is almost the only exception. There are many other cases in which the jury are required to find specially, without any special venire. In replevin, they are required, if the distress was for rent, to inquire of two things; the amount in arrear, and the value of the goods distrained. This, too, is by statute; but a special venire was, we presume, never thought of in such a case.

Motion denied.

UTICA,  
Aug. 1826.

Van Deusen  
v.  
Brower.

VAN DEUSEN against A. BROWER, J. BROWER, P.  
BROWER AND C. M. BROWER.

In a non-bailable action against infants, the plaintiff may take a rule that they appear in 20 days after personal service of the rule; or that the plaintiff's attorney have leave to appoint John Doe, a nominal person, for their guardian, and enter their appearance.

On filing an affidavit of the service, the plaintiff may enter a rule of course for the appointment of John Doe as guardian.

In an action against heirs, if they will show nothing by descent, or insufficient assets by descent, they must plead, or give notice of this specially; and cannot show it upon the general issue.

THIS action was assumpsit against the defendants, as heirs at law of Aaron Brower, deceased. The *captia ad respondendum* was returned served on all the defendants, in August term, 1820. A. and J. Brower, being adults, appeared and pleaded the general issue. The other two defendants being then and still infants, the plaintiff, at the October term, 1820, obtained a rule that they appear by some guardian, in 20 days after personal service of the rule; or that the plaintiff's attorney should have leave to appoint John Doe for their guardian, and enter their appearance. Service of the rule being made accordingly, and they not appearing, on filing an affidavit of the service, the plaintiff entered his rule for the appointment of John Doe, a nominal guardian, having no real existence.

The cause was afterwards tried on the general issue as to the other defendants; and no defence of *riens per descent* was interposed. In February term, 1825, the plaintiff entered a judgment for the plaintiff generally against all the defendants, upon the verdict against the adults, and on *nil dicet*, as to the infants.

A *n. fa.* was issued against, and levied on the property of all the defendants before one year had elapsed after the judgment. No return day was mentioned in this execution.

J. A. Spencer moved to set aside the judgment, and all subsequent proceedings. He cited 2 Tidd, 854; 13 John.

The rules of pleading are the same in this respect, in the case of heirs, as of personal representatives.

If they do not so plead, the plaintiff may take judgment, either generally, or of assets descended, at his election.

Execution against infant heirs cannot issue till a year after judgment.

But where some of the heirs are adults, it may issue against them short of the year.

If issued against both short of the year, it may be so amended as to affect only the adults.

Where the plaintiff appears for infants by a nominal guardian, the court will, at any time before the judgment is finally executed, let them in to plead, the judgment standing as *securit*.

Execution amended as to the return day.

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Gould  
v.  
Ogden.

But no laches can be imputed to the infants ; and if any one will put in an advantageous plea for them, it should be received. Let the default as to them be set aside, provided they appear by guardian in two months : the present judgment, however, to stand as security.

No costs are allowed on either side.

Rule ; That the motion to set aside the judgment and execution be denied as to *Aaron* and *John Brower* ; but granted as to the other defendants ; that the plaintiff have leave to amend his execution by inserting a return day ; and so that it shall be operative against the estates of *Aaron* and *John Brower* only ; that the default against the other defendants be set aside, provided they appear in two months by a real guardian, the present judgment standing as security ; and no costs of this motion to be allowed on either side.

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W. GOULD, BANKS AND S. GOULD *against* OGDEN.

Where a question of law arises before referees, which is brought before the supreme court, and decided ; they will order a special entry on the record, so as to present the same question to the court of errors.

ASSUMPSIT for goods sold, &c. with the other common counts. Plea, non-assumpsit, with other pleas, and a notice of set off.

The cause was referred on the defendant's motion ; and the question before the referees was, whether certain payments made by the defendant to, and receipted by *S. Gould*, should be applied to the demand in favor of the plaintiffs. The referees allowed the payment ; and reported only \$3,70 in favor of the plaintiffs. The report was signed Nov. 20th, 1823 ; and being filed, notice was given of a motion to set it aside on the merits, at *February* term, 1824. In *February* term, 1825, the motion was denied. The defendant, on the 29th of *April* last, gave notice of taxing his costs.

The motion to set aside the report was founded on the sole affidavit of the counsel for the plaintiffs ; and

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*J. Hoyt* now moved that the defendant be required to incorporate that affidavit in his judgment record ; so as to enable the plaintiffs to bring error upon the decision of the referees ; and cited *Reid v. The Rensselaer Glass Factory*, (3 Cowen, 387.)

UTICA,  
Aug. 1826.  
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Ex parte
Caykendoll.

J. Platt, contra.

Curia. Take a similar rule to the one granted in *Reid v. The Rensselaer Glass Factory*, (3 Cowen, 389.) (a)

Rule accordingly.

(a) Vid. S. C. on error, 5 Cowen, 587 ; where the practice adopted by the supreme court was sanctioned.

Ex parte CAYKENDOLL.

IN *December* term, 1825, of the *Orange C. P.* a cause was tried between *Caykendoll* plaintiff, and *Van Bomel*, defendant. The action was *assumpsit* ; and the jury found for the plaintiff, \$60 damages.

Afterwards, three of the jurors made affidavit that the action was brought on a written agreement for drawing, rafting and running boards, by the plaintiff, for the defendant ; that the price fixed by the contract was 9s. per 1000 for drawing, and 10s. for rafting and running ; and that in calculating the sum to be allowed the plaintiff, the jury multiplied the number of boards drawn, by 19 instead of 9, which made about \$60. That the jury intended to allow for the drawing only ; and the deponents believed that the mistake arose from the jury reading 19 for 9, in the agreement, (which was delivered to the jury,) and supposing this was the sum fixed for drawing only ; that they did not discover their mistake till the day after the verdict, when it became a subject of anxious inquiry among them how the mistake should be rectified.

The affidavits of jurors cannot be received to show a mistake in making up their verdict ; unless the mistake is produced by circumstances passing at the trial which are equivalent to a misdirection of the judge.

On these affidavits, the *C. P.* granted a new trial.

UTICA,
Aug. 1826.

Johnson
v.
Gay.

A motion was now made for a mandamus commanding the C. P. to vacate their rule for a new trial, and give judgment according to the verdict.

C. Monell, for the motion, cited 2 *T. R.* 281 ; 5 *Burr.* 2667.

Curia, per SUTHERLAND, J. The decision of the court of common pleas cannot be sustained. It is certainly well settled, that the affidavits of jurors cannot be received to show a mistake in making up their verdict ; and we never intended to detract from that rule in *Sergeant v. —*, (5 *Coven*, 106.) In that case, the counsel advanced an erroneous rule of damages to the jury, which was not corrected in the charge of the judge. The jury were in this way led to adopt the rule. We considered these circumstances equivalent to a positive misdirection of the judge ; and allowed the affidavits of jurors to be read, showing that they were, in fact, misled. It was impossible to make out what, in truth, operated as a misdirection of the judge, in any other way. Misdirection is a very usual ground for granting a new trial ; and the case cited establishes merely, that a set of circumstances may amount to the same thing ; and may be shown by the affidavits of jurors. Farther we did not mean to go ; and we expressly disclaimed the idea of trenching on any of the cases which had refused to hear the affidavits of jurors. The motion must be granted.

Rule for an alternative mandamus.

JOHNSON *against* GAY.

An order of referees as to the costs, on postponing the hearing before them, is not a

THIS cause being referred ; and the referees having convened to hear it, the defendant's counsel moved, on the affidavit of the absence of a material witness, to put off the foundation for a rule on the subject, in the supreme court.

Whether they may impose costs as the condition of adjourning ? *Quare.*

hearing. This was objected to by the plaintiff's counsel, unless the plaintiff's costs of preparing for the hearing were first paid. But the referees doubting their power to impose this condition, though they agreed that the costs should be paid, adjourned unconditionally.

UTICA,
Aug. 1836.
Doe
v.
Roe.

W. H. Maynard, now moved for a rule against the defendant, that he pay the costs, (which had been taxed,) or that an attachment issue.

C. P. Kirkland, contra, cited 1 *R. L.* 516, s. 2; *Jac Law Dict. Attachment.*

Curia. Any order or direction as to costs, which referees may make, is no foundation for our interference by attachment. Nor is it necessary, in this case, for us to say, whether they have power to impose the payment of costs as the condition of an adjournment.

Motion denied.

DOE against ROE.

THIS was a case made on trial of a feigned issue of *deviavit vel non*, directed by the judge of the 6th circuit, sitting in equity.

The judge of that circuit tried the cause at law. The cause being on the calendar of the present term for argument upon the case,

J. Platt moved, on the authority of *Doe v. Roe*, (1 *Cowen*, 216,) to strike it off.

J. A. Spencer said that case was distinguishable from this; not only as being an issue on a bill filed for a divorce, but also as arising under the old organization of the judiciary; when the judge who held the circuit had no chancery powers. Here the very judge who orders the issue, tries the cause at the circuit; and reviews it on a motion for a new trial.

The supreme court will not, in general, hear a motion for a new trial, on a case made up on the trial of a feigned issue ordered by a circuit court of equity.

The proper course is, to move in the court which ordered the issue.

ETICA,
Aug 1326.

Adams
v.
Minton

Curia. We do not mean to say that we have not power to hear the case; but we think the most proper course is to move in the court of equity.

Motion granted.

ADAMS against MINTON.

A plea served before special bail is perfected, in a bailable action, is a nullity; and does not become good by a subsequent justification; unless it was received *de bene esse*; and notice of this given to the defendant.

MOTION, by the defendant, to set aside the plaintiff's verdict for irregularity.

The action was a bailable one. The defendant put in *R. Farr* and *John Doe* as bail; and sent a plea of the general issue to the plaintiff, the 24th of *April* last. On the 30th, the plaintiff gave notice of exception to the bail. The defendant then gave notice of moving for an order to mitigate bail; and that two substantial persons would justify as such, on the 20th day of *May*. On that day, the amount of bail was fixed by the commissioner; and a justification took place accordingly; whereupon, without waiting for a new plea, the plaintiff immediately, on the same day, served notice of trial, for the following *June* circuit; when he took an inquest. This was on the 9th of *June*. On the 30th of *June*, the plaintiff was served by the defendant with a copy of the former plea.

J. H. Ostram, for the defendant, now insisted that the first plea was a nullity, on the ground that the bail had not become perfect when it was served.

A. Dana, contra.

Curia. It is impossible to sustain this proceeding. Here was no bail for any substantial purpose, when the first plea was served. This has been decided over and over. (2 *Coven*, 622. 1 *id.* 54, 60, 226.) In the two last cases, the plaintiff's attorney returned the pleas, on the ground that bail was not perfect; but there is no need of this ceremony. Whether he do it or not, the plea must

be regarded as a mere nullity ; and the plaintiff may take his default, even after the bail have justified, (1 *Archb.* 112, 4 *T. R.* 578,) except in the case of a plea in abatement. (1 *Archb.* 112. 2 *East*, 406.) The justification does not make the plea good in the plaintiff's hands ; nor will his filing common bail have that effect, after he has refused a plea for want of special bail. (1 *Cowen*, 226.) The course of the plaintiff was to wait the four days after justification ; and then take his default for want of a plea, according to the 7th gen. rule of *April* term, 1796. This case is the stronger, inasmuch as the plaintiff virtually declined the plea, by excepting to the bail. If he had intended that it should become good without any new service, he should have received it specially, and given notice of this to the defendant's attorney.

UTICA,
Aug. 1826,

Harvey
v.
Bardwell.

Motion granted with costs.

HARVEY and WALKER *against* BARDWELL and others.

A MOTION was made in behalf of the defendants, that the judgment for the plaintiffs, *as to costs*, be set aside ; and that the defendants be allowed their costs.

The action was debt for the penalty of \$500, on sealed articles between the parties, by which the defendants (among other things) agreed to pay certain moneys to the plaintiffs. The breaches assigned, were in the non-payment of the moneys. The same articles contained various covenants on the part of the plaintiffs, to the defendants. On the penalty for the non-performance of these covenants, the defendants had, shortly after the commencement of this suit, brought their action against the plaintiffs, and obtained judgment with full costs. In the suit brought by the defendants, there was a reference ; and all matters of dispute arising under the articles, except the subject matter of this suit, were heard and passed upon by the referees, who reported for the defendants 16 dollars ; so that the question in this suit was confined merely to the amount of

In an action on a penal bond, or of debt on the penalty in articles of agreement, the judgment is properly for the penalty in all cases, except where the sum is reduced by set-off under the *stat. 1 R. L.* 515, 16.

And where the penalty of articles was 500 dollars, though the money due was only \$14 ; *held*, that the plaintiff recovering, should have full costs.

UTICA,
Aug 1836.
~~~~~  
Harvey  
v.  
Bardwell.

moneys due to the plaintiffs. This cause was also referred, and the referees passed upon the claim of the plaintiffs, reporting \$14 in their favor. They entered up judgment for the penalty with full costs.

*J. Dickson* for the motion.

*C. Perkins*, contra.

*Curia.* The demand of the plaintiffs having been narrowed down to a money claim; and their being no need of the penalty to secure further breaches; and the damages reported being only 14 dollars, and below what, in a judgment, would carry costs, the question is, whether the penalty or the damages were the proper measure of the judgment. When that is ascertained, we have a test for the costs. (13 *John. Rep.* 345.)

The case of *Alendorph v. Stickle*, (2 *Cowen*, 412,) was one of set-off, within the statute, 1 *R. L.* 515, 16. It was this, which led to the distinction mentioned by the court, between bonds for performance of covenants, and money bonds. Where the latter are in question upon a set-off, the sum really due is the debt; and the judgment goes accordingly, either for plaintiff or defendant. Except in the single case of set off, all bonds and agreements secured by a penalty, stand on the same footing; and the plaintiff recovers costs according to the penalty. The case of set-off is *sui generis*, and stands upon the statute providing for that alone. (*Vid.* 2 *John. Cas.* 406. 10 *John. Rep.* 219. 13 *id.* 345. 5 *Cowen*, 424. 2 *Cain. Rep.* 107.)

The motion must be denied with costs.

Motion denied.

UTICA,  
Aug. 1886.

CLARKE *against* SPENCER.

Ex parte  
Decker.

GENERAL indebitatus assumpsit. On the application of the defendant's attorney to a commissioner having power to do chamber business of a judge of this court, he made an order, "that the plaintiff's attorney deliver to the defendant's attorney a copy of the receipt, which is the evidence of the payment of the money for which this suit is brought;" and in the mean time that all proceedings in the suit be stayed.

A motion was now made to set aside this order, on the ground that the commissioner had exceeded his powers.

*H. Welles*, for the motion, cited 19 *John*. 268; 1 *Cowen's Rep.* 574.

*B. D. Noxon*, contra, cited 1 *Cowen*, 571; 2 *Archb. Pr.* 197, 198.

*Curia*. In *Willis v. Bailey*, (19 *John*. 268,) this court declared they had not adopted the English practice of allowing these orders at Chambers. Aside, therefore, from the question whether even this court would order copies of papers, which are not the direct foundation of the suit or defence, to be furnished, the motion must be granted.

Motion granted.

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*Ex parte* DECKER.

BAKER recovered judgment against *Decker* in a justice's court of the county of *Steuben*, whence *Decker* sought to appeal. For this purpose, within the time limited for appealing, the requisite bond was prepared, with a blank

An appeal bond executed in blank, and delivered to an agent, to fill up and make perfect, cannot be al-

tered by him, after he has filled the blanks, and delivered the bond to the justice.

Whether a parol power to fill the blanks and perfect the bond, was valid? *Quare*.

UTICA,  
Aug. 1826.

Ex parte  
Decker.

for the penalty and the amount of the judgment; and executed by *Decker* and a surety. This they delivered to the subscribing witness, with oral power to fill up the blanks according to the judgment; and also to make any other alterations necessary to render it valid according to the statute. The witness carried the bond to the justice; and on learning the amount of the judgment, filled up the bond. Afterwards, and still within the time for appealing, supposing the bond to be defective in other particulars, the witness requested the bond of the justice, for the purpose of making it perfect. The justice refused his consent to the alteration, declaring that he did not think it proper. But the witness took the bond and added the clause obliging the obligors to *pay the judgment before the justice, with interest and costs of the appeal, &c.*

The justice made the proper return; but the C. P. dismissed the appeal, on the ground that the authority of the witness was by parol.

*Wm. M. Oliver*, now moved for a mandamus commanding the court to proceed in the cause. And he relied mainly on *Texira v. Evans*, cited in *Master v. Miller*, (1 *Austr.* 228,) which was the case of a bond executed with blanks for the *name of the obligee and sum*; and delivered by the obligor to an agent, for the purpose of raising money. The plaintiff lent money; and the agent filled the blanks accordingly, and delivered the bond to the plaintiff. On *non est factum*, the bond was held good.

He also cited 11 *John.* 169; 4 *id.* 54; 18 *id.* 499.

The motion was not opposed; but

*Per Curiam.* The common pleas decided correctly. Though the agent might have had power to correct the bond on its delivery, (a point which it is not necessary to decide,) he certainly had no right to tamper with the bond in this way. He could not alter it again and again at his discretion. Such a general power cannot extend beyond the time of delivery. Its force was spent on filling up the blank.

Motion denied.

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Aug. 1836.

Ex parte  
La Farge.

*Ex parte* LA FARGE.

*G. C. Bronson* moved for a mandamus to the judges of the C. P. of *Jefferson* county, commanding them to vacate a rule quashing an appeal, by *La Farge*, from a judgment before a justice against him, at the suit of *Fuller & Everts*.

No costs were actually paid to the justice, on serving the notice of appeal; but *La Farge* directed him, in writing, to charge the costs in account against him, which the justice did; and made an affidavit, (which was read in the C. P. on the motion to quash the appeal for this cause,) that he accepted this direction for the costs.

*J. A. Spencer*, contra, objected to the reading of the affidavit on which the present motion was founded, on the ground that it was entitled, "Sup. Court. In the matter of *John La Farge* against the judges of the court of common pleas of *Jefferson* county."

*Curia*. This is not such an entitling of the affidavit, as comes within the rule relied on, that an affidavit entitled cannot be read. It is not entitled in any cause as pending in this court.

As to the merits of the motion, however, clearly there was no payment. The writing was a mere acknowledgment that *La Farge* owed the costs; and a request that they should be charged to him. To entitle him to an appeal, the party must comply strictly with the terms of the statute. The money must be actually paid.

Motion denied.

UTICA,  
Aug. 1826.

Bank of Utica  
v.  
Hillard. THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK  
OF UTICA *against* HILLARD.

The English practice of ordering a party to furnish papers, or allow copies to be taken, thus furnishing evidence against himself, has not been adopted by the supreme court, except where the paper is the immediate foundation of the action; and in a few other cases depending on peculiar circumstances.

J. A. Spencer, for the defendant, moved for a rule upon the plaintiffs, that they furnish to the defendant's attorney copies of certain entries made in their books relating to the note which they had declared on in this cause, or allow some proper person to inspect and take copies of their books.

He cited *Clifford v. Taylor*, (1 Taunt. 167;) *Goldschmidt v. Marryat*, (1 Campb. Rep. 561, 2;) *Potts v. Adair*, (1 Anstr. 259,) and *Gabbit v. Cavendish*, (2 Anstr. 547.)

*S. Beardsley*, contra. This is not a motion by corporators, who have an interest in the books sought to be inspected; but by a mere stranger, who has no right to look into the private account books of his adversary. There is no difference, in this respect, between a corporation and a private person. When the writing sought to be examined, does not constitute the immediate foundation of the action or defence, the court will not order an inspection, or a copy to be delivered, except in cases where forgery is alleged, or in actions on policies of insurance.

*Curia.* It seems by one of the cases cited in support of this motion, that the English courts go great lengths in granting the description of order applied for. It is granted by a judge at chambers; and the party is compelled to furnish evidence to the full extent of what he would be bound to do on a bill of discovery. This practice is of recent origin in *England*. It has not been adopted by this court; and we have often declined to follow it, on motion to compel the party to furnish evidence in this way against himself, except in certain cases; as where the instrument to be inspected or copied is the immediate foundation of the action; and in a few other cases, depending on peculiar circumstances. (*Willis v. Bailey*, 19 John. 268, 9.)

We see no reason, in the instance before us, for going farther.

Motion denied. (a)

(a) Vid. 5 Cowen, 419, S. C. and Clark v. Spencer, ante, 59.

UTICA,  
Aug. 1836.

Oshiel  
v.  
De Graw.

OSHIEL *against* DE GRAW, impleaded with *Rogers* and *Rogers*.

COVENANT, on a bond given by *De Graw*, as surety, under the statute authorizing an appeal from a justice's court, conditioned to prosecute the appeal, &c.

*Jas. Edwards*, for the defendant, moved to set aside a default for not pleading; and that, on the defendant's paying the penalty of the bond, which was 100 dollars, with costs, into court, all further proceedings be stayed, &c.

*W. Mulock*, contra.

The facts are stated by the court.

*Curia*. The motion to set aside the default must be granted, if the service of an order to stay proceedings on the plaintiff's attorney was regularly made before the default was entered. The service was between 7 and 8 A. M. by affixing the paper on the office door, in the city of *New-York*, no one being within. The default was entered after 9 A. M. of the same day, by the plaintiff's attorney, on his way to the office, without his knowing any thing of the order. His office was in *Pine-street* and his residence in *Spring-street*; both facts being known to the defendant's attorney.

In serving a paper, every thing should be done, which ordinary diligence requires, to bring a knowledge of it home to the attorney in proper season. The service here was at an hour of the morning before the offices are usually open in *New-York*, with a knowledge that the attorney resided in the same city; and after the expiration of a pre-

Service of a paper on an attorney in the city of *New-York*, by affixing it on the door of the office, no one being at the office, and the door locked, before 9 A. M. is not good service.

Service of papers at the office of an attorney in the city of *New-York*, should be within office hours, which do not commence before 9 A. M.

Proceedings ordered to be stayed in an action against the surety in a bond given on appeal from a justice's court, on his paying the amount of the penalty into court with costs.

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vious order enlarging the time to plead. On finding the attorney and his clerk both absent from the office, which was naturally to have been expected, the obvious course was to search for him at his residence. Allowing this very loose manner of service, is certainly calculated to entrap the opposite attorney, though he may proceed with the greatest caution. No case has gone so far, where it appears, as it does here, that the paper was not actually received. Services at the office, in the city of *New-York*, should be within office hours, which do not commence before 9 A. M. There is no affidavit of merits; though, it seems, an important question of law exists as to the amount which the plaintiff claims against the defendant.

We think the service was irregular.

Still there can be no objection to the other branch of the defendant's motion, if this be a case in which the plaintiff is plainly entitled to no more than the penalty of the bond. The amount of the penalty, with the costs, have been tendered to his attorney. Money has been paid into court after a verdict in slander, with a view to save farther costs. (*Hatfield v. Baldwin*, 1 *John. Rep.* 506.) And staying proceedings in an action on a bond for the performance of covenants, and the like, on payment of the penalty and costs, is a very usual exercise of power. (1 *Dunl. Pr.* 338, and the cases there cited.) It is now well settled by a series of decisions, that a surety is never liable on a bond beyond the penalty. (*Clark v. Bush*, 3 *Cowen*, 151. *Fairlie v. Lawson* 5 *id.* 424.) And there can be no objection, therefore, on the ground that the sum is unliquidated, where the proposition is to pay to that extent. This being the undoubted rule as to bonds in the course of private business; is the case of a bond, given by a surety pursuant to a statute, an exception? *Fairlie v. Lawson* presents such a case; but the point was not raised. Why is the penalty limited by the statute, unless for the protection of the sureties?

We are not aware that statute sureties, such as bail to the sheriff, bail in error, &c. who give a bond or recog-



nizance with a penalty, have ever been holden liable beyond that penalty. And in *Hefford v. Alger*, (1 Taunt. 218,) the C. P. held the two sureties in a replevin bond, together liable only for the penalty and costs.

True, on appeal, the security may, in this view, be many times very inadequate. Being regulated by the amount of the judgment below, it may sometimes be merely nominal. But this evil can be remedied by the legislature only.

The appellee must look to the party for all beyond the penalty.

This branch of the motion is, therefore, granted.

Rule accordingly.

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SHARP and TUTTLE against CASWELL.

*L. Ford*, for the defendant, moved to set aside the *testatum fieri facias*, issued in this cause against the defendant, for irregularity.

He read an affidavit, showing that a judgment was perfected in favor of the plaintiffs against the defendant, for \$442,96, in October, 1817. That soon afterwards, a *testatum capias ad satisfaciendum* was issued on the judgment, upon which the defendant was imprisoned in the common gaol of *Herkimer* county; and having procured bail for the gaol liberties, had continued a prisoner upon the liberties for that time to the present, upon the *ca. sa.* That on the 3d day of *February* last, a *testatum fieri facias* was issued upon the judgment, and placed in the hands of the present sheriff of *Herkimer*, by virtue whereof he had levied on a large amount of personal property owned by the defendant.

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v.  
Caswell.

*It seems*, that a second execution cannot be issued within the statute (1 R. L. 436, s. 24,) on the ground that the defendant has escaped, unless the escape continue till the time of its issuing.

The escape must be such as will charge the sheriff.

At any rate, on so grave a question, the plaintiff should proceed by *sc. fa.*

*M. Hoffman*, contra, read various affidavits, showing that the defendant had made frequent escapes from the liberties since he was committed; and before the issuing of the *fi. fa.*; and claimed that it issued properly with-

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in the statute, (1 R. L. 426, s. 24,) which provides, "that if any person who shall be taken on any execution, or committed thereon to any prison, shall escape by any ways or means howsoever, the creditor, at whose suit such prisoner was taken or charged in execution, may re-take such prisoner by any new *capias ad satisfaciendum*, or sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution."

But it appeared that these escapes were principally on *Sunday*; and that when the *fi. fa.* issued, the defendant had returned, and was within the gaol liberties.

*Ford* insisted that the statute did not apply to a temporary escape, from which the prisoner has returned and is in custody at the time of the second execution. The escape intended is a permanent one; such an escape as will work a forfeiture of the gaol bond.

*M. Hoffman*, contra. Departing from the gaol on *Sunday* was an escape. This was held in *Tillman v. Lansing*, (4 John. 45.) *Janson v. Hilton*, (10 John. 549,) supports the same position. The escape being on *Sunday*, goes only to the remedy. Process cannot be served if there be a return before the day closes. (1 R. L. 163, s. 5.) Formerly even this was otherwise. (*Com. Dig. Temps. B. 3.*) Every going at large is an escape, unless it be on *habeas corpus* or rule of court. (1 R. L. 426, s. 21.) The condition of the limit bond is, that the person arrested on the *ca. sa.* shall remain a true and faithful prisoner; and shall not, at any time, &c. escape. The recaption or return is matter of defence to an action; (*id.* and 3 Salk. 150, case 5<sup>th</sup>;) and it must be pleaded. (1 R. L. 426, s. 23.)

If this be an escape, the condition arises within the statute, upon which a second execution may be issued. This was held in the late case of *Mumford v. Armstrong*, (4 Cowen's Rep. 553.)

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this qualification. All the statutes declaring the effect of an escape, must be taken in the same way.

But, at any rate, on a grave question of this kind, the plaintiff should be put to his *sci. fa.* or motion, before he is permitted to take a second execution. The former should be preferred; because it will enable the party to pursue fully what he conceives to be his right, should the opinion of this court be against him. To turn us round to an action would be no remedy; for the process will protect the sheriff and the party, if suffered to stand.

*Curia.* We are inclined to think the true construction of the statute is as contended for by the counsel for the defendant; that this remedy by a second execution can not be taken, except in a case where the sheriff might be charged for the escape; and that, at any rate, it must be issued before the escape is purged by the return. This construction is strengthened by the phraseology of the statute in relation to a second *ca. sa.* It is, that the plaintiff may *retake* the defendant by a new *ca. sa.*; or sue forth any other kind of execution. Now, how can he *retake* the defendant where he has already returned into custody, and remains there? This can only be where there is a continued escape; and we think a remedy by any kind of execution must depend on the same condition. There is nothing in the statute making a distinction; and giving a *fi. fa.* where a second *ca. sa.* would not lie.

We do not mean, however, to be understood as finally determining the question. The party may still go to his *sci. fa.* if he chooses; and we do mean to say, that on a question so important, that is the proper course.

The motion must be granted without costs.

Rule accordingly.

WOODWORTH, J. was absent.

*Ex parte* STEPHENS.

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*Ex parte*  
Stephens.

JUDGMENT was recovered against *Stephens* by *Phillips*, before a justice of *Onondaga*, and execution issued, upon which *Stephens* being imprisoned, paid the judgment to the plaintiff, and took his receipt. Being discharged, he attempted to appeal to the *Onondaga* C. P., and paid 75 cents to the justice; but did not pay him the costs of the suit, supposing that the payment to the plaintiff was the same thing. The justice making no return, the C. P. granted a rule that he return, or show cause, &c. which they afterwards discharged, on the ground that the costs were not paid to the justice.

A motion was now made for a mandamus commanding the C. P. to proceed, and compel a return.

*G. Lawrence* for the motion.

It was not opposed; but

*Per Curiam*. The act is very strictly construed. To entitle the party to appeal, he must follow up the requisites prescribed to him with great exactness. Such appears to have been the intention of the legislature; and with this accords the current of decision. The statute, (*sess. 47, Ch. 238, s. 36, p. 295,*) is, that the party appealing shall pay to the justice the costs of the suit; and also the sum of 75 cents for making and filing the return. The words have not been complied with. The 75 cents, but not the costs, were paid to the justice. The motion must be denied.

Motion denied.

To entitle a party to appeal from the decision of a justice under the 50 dollar act, he must pay, not only the 75 cents for making and filing the return; but the costs to the justice. Paying the 75 cents to the justice, and the costs to the opposite party, will not satisfy the words of the act; which are to be taken strictly against the party seeking to appeal.

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Aug. 1836.

Ball  
v.  
Bank of Utica.

BALL *against* THE PRESIDENT, DIRECTORS and COMPANY of the Bank of UTICA.

A declaration will not be set aside on the ground that it varies from the original writ; though that original be a special one.

*G. C. Bronson* moved to set aside the amended declaration, on the ground of variance from the *special* original. The writ was in assumpsit: and had four counts on special agreement. The first declaration followed the writ; but the plaintiff amended of course; omitting all the special counts of the writ, and inserting the general ones in assumpsit.

*B. D. Noxon*, contra, relied on 1 *Saund.* 318, *a. note* (3), and the cases there cited; with what this court said in *Rogers v. Rogers*, (4 *John.* 485,) and the cases there cited.

*Bronson*, in reply, said these authorities sanctioned the variance only in cases of general originals; as the original *quare clausum fregit*, which is used in the English C. P.

*Curia.* This does not appear to be the distinction. In general, now, variance from the original cannot be pleaded in abatement, whether the original be general or special. There is hardly an exception to this rule. Even on error for the variance, this court will suffer the plaintiff to amend the original, so as to conform to the declaration; and that may be done at any time in this case, provided it becomes necessary. (1 *Chil. Pl.* 246, 249.)

Then the defendant shall not be permitted to do that by motion to set aside the proceedings, which he could not do in any other way. We will not look into the original to sustain such a motion. (1 *Saund.* 318, *a. note* (3).)

*Spaulding v. Mure*, (6 *T. R.* 363,) is in point. That was a special original with 4 counts in assumpsit; 2 against the defendants as surviving partners; the others in their own right. They having given bail, the plaintiff declared against them in their own right only. The court agreed

that this was a variance in substance ; and they discharged the bail. But they refused to set aside the declaration.

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Motion denied.

Ford  
v.  
Crane.

FORD *against* CRANE and CANFIELD, executors of  
WARING.

MOTION to set aside the non-pros of the plaintiff, for not replying, with all subsequent proceedings.

The action was *assumpsit* against the defendants as executors. They pleaded, 1st, non-assumpsit : and 2d, an outstanding judgment, and *plene administravit præter*. The defendants ruled the plaintiff to reply to the last plea ; which not being done within the 20 days, they entered the plaintiff's default ; and were now proceeding on a rule for judgment of *non pros* to perfect a judgment, with costs against the plaintiff.

It was conceded that the default was regular ; and the only question was, what judgment should follow.

For the plaintiff it was insisted, that it should be the same as if he had replied, admitting the plea, and praying judgment *quando*, &c.

*L. Ford*, for the plaintiff, cited 2 *Saund.* 226.

*J. Butterfield*, contra.

*Curia.* There is no doubt of the plaintiff's right so to reply ; and take judgment of assets *in futuro*. This is all which is proved by *Noel v. Nelson*, cited for the plaintiff from 2 *Saund.* 226. But he might also have replied *nul tiel record* ; or taken issue on the question of assets *præter* ; and so have sought to oust the defendants of their defence. It was impossible for them to say which course the plaintiff would pursue. If he had taken the latter, and failed in maintaining his issue at the trial, the judgment

Where the defendants, being executors, pleaded the general issue, with an outstanding judgment ; and *plene administravit præter* ; and ruled the plaintiff to reply to the last plea, which he omitted ; *held*, that the only effect of the default would be, judgment for the defendant, with the costs on that branch of the defence founded on the special plea ; but the plaintiff might still go to trial on the issue ; and if he succeeded, take his judgment *quando acciderint* ; and the judgment could not be perfected for the defendant till the issue was disposed of.

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Peacock.

would have been for the defendant, that he recover his costs, even though he might have failed on the general issue. (*Osterhout v. Hardenbergh*, 19 *John. Rep.* 266.) According to this case, the plaintiff may still go on upon the general issue; and recover his judgment of assets *quando acciderint*, if he succeeds upon that issue. But that is no reason why the defendants should not take their non-pros with costs. It does not finally dispose of the cause; but it does dispose of this particular plea of *plene administravit præter*, the same as if it had been found for the defendants on an issue. It carries their costs. The error of the plaintiff lies in his supposing that the defendants are bound to know what he would reply. It is not so. He should elect. Not doing so, the defendants may take the most from their plea. The non-pros is qualified according to the nature of the plea, which, though true, is not a perfect bar; and, for that reason, if false, will not subject the defendants to judgment *de bonis propriis*. (*id.*)

But the judgment for the defendant cannot be perfected till the other issue is disposed of.

We order the rule for judgment of non-pros to be set aside. This leaves the default standing; and what is to be finally done must await the result upon the other issue.

Rule accordingly.

#### THE PEOPLE *against* GEORGE PEACOCK.

Certain coal being consigned to P. of New-York, arrived there, and was claimed by another of the name of P., who resided in the same city; but was not the true assignee; and

he, knowing this, obtained an advance of money, on endorsing the permit for the delivery of the coal with his own proper name. *Held*, that this was forgery; and not the merely obtaining of goods upon false pretences.

THE defendant was convicted of forgery at the last court of oyer and terminer in the city and county of New-York; and now stood committed for sentence, upon the following facts:

On the 8th of May, 1826, the brig *Rival* arrived from New-Castle, in the city of New-York, with a quantity of coal consigned to George Peacock, there being two per-

sons of that name residing in different streets of the city. The consignment was in truth intended, not to the prisoner; but the other person of the same name; and this was known to the prisoner. He, however, claimed the coal; and went to Mr. *Masters*, the consignee of the ship, and told him that the coal belonged to him (the prisoner.) He then went to Mr. *Pell*, said he had a quantity of coal, and wanted an advance. *Pell* made an advance of \$450, on the defendant signing over to him the permit for the delivery of the coal. There was some slight proof at the trial, that the prisoner's name was *George W. Peacock*; but he had always been known and called in the city, where he had been in trade, by the name of *George Peacock*. He did not imitate the hand-writing of any other person upon the permit, and did not represent himself as residing at any particular place.

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On application of the prisoner's counsel, the oyer and terminer suspended the sentence, till the opinion of this court could be taken, whether the above facts warranted the verdict.

*J. D. Wheeler*, for the prisoner. The prisoner represented himself to be the owner or consignee of the coal, and the person named in the bill of lading; and endorsed his own name in his own proper hand.

Offences should be kept distinct, and not suffered to run into each other. Now, though this may be a fraud, indictable under the statute, (1 *R. L.* 410, s. 13,) as an obtaining of money upon false pretences, it is not a forgery. The latter is defined to be "the fraudulent making, or alteration of a writing to the prejudice of another man's right." (4 *Bl. Com.* 247.) The definitions in the other books are substantially the same; (2 *Ch. C. L.* 1023; *Stark. Cr. Plead.* 449; *East's P. C.* 853; 2 *Leach's C. L.* 898, per *Grose, J.*;) and all the precedents of indictments, whether at the common law, or on English or American statutes, contain this allegation: "Did falsely make, forge and counterfeit." (2 *Ch. C. L.* 1053.) What is falsely forg-



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ing? In common meaning it is a lie. But in the law it has a technical and confined meaning; and if one make a false coin or writing, it is a forgery. But if one puts his true name to a writing, how can that be called false? The representation that he is the very man, may be false; but not so as to the signature. That is true; and the averment of falsehood is not made out. *Counterfeit* implies imitation, or the use of a name not in existence or not known; and in either case this must be by writing. *Rex v. Parkes & Brown*, (2 *Leach*, 775,) does not come up to this case. *Parkes* wrote the note and signed *Brown's* name; and *Brown* was convicted of passing it, as the note of another. *Parkes* was found not guilty. I admit the signing of a fictitious name is forgery. (*Rex v. Dunn*, 1 *Leach*, 57. *Rex v. Taylor*, *id.* 257. *Rex v. Taft*, *id.* 172. *People v. Grant*, 3 *C. H. Recorder*, 143.) *Mead v. Young*, (4 *T. R.* 28,) was a civil action. The court were not called on to determine what shall constitute forgery; nor could they do so in that action. Fraud would vitiate the endorsement as well as forgery; and there was a plain fraud in the case. The court chose to call it a forgery; but it does not follow that it was indictable as such. That, it is true, was the case of a man's endorsing his own name as payee of a bill, representing himself to be another person intended by the drawer. In *Aickles' case*, (1 *Leach*, 433,) this very question arose in principle. One who claimed the same name, signed, representing himself to be another; and it was held not to be a forgery. This doctrine was much discussed in *Putnam v. Sullivan*, (4 *Mass. Rep.* 43,) by *Parsons*, Ch. Justice. One obtained notes endorsed in blank, by false pretences, and afterwards filled them up differently from what was intended by the endorser. Yet this was held not to be forgery.

The offence in this case is, in truth, merely that of falsely personating another; for which the defendant may be indicted at the common law; and various statutes have been made in *England* against personating in certain cases. (2 *Chit. C. L.* 1081.) The doubt really is, whether the

crime be false personating, or obtaining goods under false pretences ; not whether it be forgery.

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*Talcott*, (attorney general) contra. The name of the defendant was not literally endorsed. It appears by the case, that *George W. Peacock* is convicted of endorsing the name of *George Peacock*, the name of another person ; not his own name. The doctrine in *Franklin v. Tallmudge*, (5 *John. Rep.* 84,) that the law knows of but one christian name, and the omission of the middle letter was therefore immaterial, is not borne out by the authorities, in the full extent to which it is laid down. A man may not have more than one name of baptism. This was the ancient rule ; and the case cited makes a wrong application of it. It does not follow that a man cannot have two names.

But if the defendant has signed his own name, still there is no difficulty in the case. The circumstance that he omitted to mention a place of residence, is only matter of evidence. Had he mentioned one, the falsehood might have been clearly made out from that circumstance. But when he says directly that he is the owner of the coal, which is as directly contradicted, it amounts to the same thing ; and there is no want of evidence.

In *East's C. L.* 969, a corrected account is given of *Aickles'* case, cited by the counsel from *Leach*. It is there put on the fraud or intent to deceive, and holden forgery by *East* ; but in truth the case never was decided.

The credit in the principal case was not given to the person, but to the permit ; which it was supposed gave a legal right to demand the coal. *Shepherd's Case*, (*East's C. L.* 967,) taken in connexion with the case of *Aickles*, will show the force of this distinction. If the credit be given to the paper, it is beyond doubt a forgery. *Rex v. Parkes & Brown* was the same thing as if *Brown* had himself signed the note. It was signed by the name of a *T. Brown*, not by the name of *the T. Brown*. This was held to constitute the offence. *Mead v. Young*, cited by the counsel for the prisoner, involved the very question in dispute.

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There the endorser put his own name, pretending to be the true payee, when in fact he was not; and the court unhesitatingly pronounced it a forgery. (2 *Russell on Crimes*, 1416. *East's C. L.* 962, 966, 856, S. P.)

The Court, intimated a strong inclination against the prisoner in the course of the argument; relying much on the authority of *Mead v. Young*; and at another day,

The Chief Justice, said they had considered the case, and were satisfied that the indictment for a forgery was sustainable; and they, accordingly, advised the oyer and terminer to pass sentence upon the prisoner.

#### DAMAREST against HARING.

SLANDER, tried at the *New-York* circuit, *December 8th*, 1824, before EDWARDS, C. Judge.  
In slander, on a motion in arrest of judgment, because the words are not actionable, they must be taken to have been proved as laid, and with the intention imputed by the declaration.

In slander, words are to be understood, by courts and juries, according to their plain and natural import; according to the ideas they are calculated to convey to those to whom they are addressed.

When doubts arise, the jury are to decide whether the words are used maliciously and with a view to defame; this being a question of fact, to be collected from all the concomitant circumstances; and the court are to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action.

Courts and juries will understand the words in the same way other people would.

Words charging the plaintiff with being the father of a bastard child by his sister-in-law, of which she was pregnant, and that he wished the defendant *to make away with it*, are actionable in themselves, as importing a wish that the defendant should destroy the child as soon as born. It imports that the plaintiff applied to him, to commit murder.

To be actionable in themselves, words must impute some act constituting a crime or misdemeanor for which corporal punishment may be inflicted in a temporal court.

It is a high misdemeanor, for one person to apply to another, and solicit him to commit murder.

Words not actionable in themselves, become so by being spoken of persons in a particular calling or profession; and, *semble*, in any lawful employment by which they may gain a livelihood.

Words imputing incontinency to a clergyman, are within this rule.

Where words may be understood in two different senses, one as imputing a crime, and the other not, it is proper to submit the question how they were understood, to the jury.

*Symb.* That setting forth the plaintiff's character in slander, as that he is a clergyman; and then a slander affecting him in that character, is sufficient, without saying the slander was spoken of him, in relation to that character. And *vid.* the cases cited by *Emmet and Oakley, arguendo*; last paragraph of their argument, S. P.

The *first count* of the declaration stated, that the plaintiff was a minister of the gospel of the reformed Dutch church, ordained and duly installed as the clergyman of the reformed Dutch church, at *Kakiat*, in the town of *Hempstead*, in the county of *Rockland*, at a certain yearly salary. That he faithfully performed his duty as such. That the defendant, wickedly and maliciously intending to injure the plaintiff in his good name, fame, &c., and in order to disgrace him, and to cause it to be believed that he was guilty of felony, adultery and lewdness, &c., on the 8th of *August*, 1823, at, &c., spoke and published certain Dutch words of the plaintiff, setting them forth, of the same signification and meaning with these English words: "That his," (the defendant's,) "sister *Peggy*," (*Margaret Haring* meaning,) "had been delivered of a child," (meaning an illegitimate child;) "and that the *domine*," (meaning the plaintiff,) "was the father of the said child; and that he," (the plaintiff,) "had laid it upon *Timothy*," (meaning one *Timothy Secor*,) "to clear himself. But he," (the defendant,) "believed it was the *domine's*," (meaning the plaintiff;) "and that the *domine* had desired him to *make away with it*," (meaning that the plaintiff attempted to procure and induce the defendant, feloniously to kill and murder the child.)

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The *second count* was substantially the same, slightly varying the words.

The *third count* was the same with the first, as to the words, except that in conclusion, it charged the defendant with saying of the plaintiff, that he had desired the defendant and his wife to make the child *out of the way*; imputing by innuendo the intent, as expressed in the first count, to induce the defendant and his wife, feloniously to kill and murder the child.

The declaration then concluded thus: "By means of the committing of which said several grievances, &c. the said plaintiff hath been, and is greatly injured in his said good name, &c.; and brought into public scandal, &c. amongst all his neighbors; and the persons composing his

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said congregation, &c., insomuch that divers, &c., suspected, &c., the said plaintiff to have been, &c., a person guilty of felony, adultery and lewdness; and have by reason, &c., refused, &c., to have any transaction, acquaintance or discourse with him, &c. And the said plaintiff hath been obliged to expend great sums of money, &c. to make manifest his innocence, &c. And a certain *Samuel Helmes* and *Henry Van Houten*, and divers other members of his said congregation, who, before the speaking and publishing the aforesaid false and scandalous words, by the said defendant, of and concerning the said plaintiff, had been and continued members of the reformed Dutch congregation, to wit, at *Kakiat* in the town of *Hempstead*, in the county of *Rockland*, and then were yearly subscribers of a large sum of money, to wit, ten dollars yearly, to the support and maintenance of the said plaintiff and his family, have refrained from attending divine service under the ministry of the said plaintiff, and have withdrawn themselves from his said congregation; and have refused any longer to pay their yearly subscriptions aforesaid, for the support of the said plaintiff and his family, and still do refuse; all which is to the damage of the said plaintiff, &c.; and therefore, &c.

*Plea*, the general issue.

On the trial, the plaintiff proved by *J. S.* that the defendant had spoken of the plaintiff at two different conversations, a set of words in the low Dutch language, which were taken down in writing, as stated by the witness, by the reverend *C. T. Demarest*, and the reverend *W. Eltinge*.

The reverend *C. T. Demarest*, having been sworn as an interpreter, translated the words as follows: "There was confusion by *Secor's* respecting that child. Witness asked him whose child? He, defendant, said his sister, *Peggy's*. He, the defendant, said the domine would have that I and my wife *Caty*, should make that child away, or out of the way. (The witness said the import of the Dutch words here used, would be either to conceal, hide or destroy; and he should think, in connexion with what

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was said about the soul, it should be rendered destroy.) He, (defendant,) said he could not do so, as it had a soul to answer for as well as I; and he, (defendant,) said that the domine had laid it upon *Tim* to clear himself; but he believed it was the domine's. Defendant said then, he (the domine) would have it put upon the stoop, or on the street; but the defendant would not have that. Then the domine would bring it to the blacks; but he, the defendant, would not have that either. The domine took the child away by force from its mother, and brought it to bad people, (or persons of no great repute,) and the child had suffered there till it died. He, (the defendant,) said something about complaining to the grand jury; but he did not remember whether defendant said he would do that, or that it ought to be done."

The second conversation was an explanation of the former; and a mere expression of a belief by the defendant, that the plaintiff was the father of the child.

Witness, (*J. S.*) farther said, he thought at the time, that the defendant intended to be understood as saying, that the domine wanted him and his wife to murder the child; and he was shocked and scared when he said it; and he thought, if it was true, the domine was no preacher for him.

The witness, *J. S.*, was then cross examined; and stated that the first conversation was after the defendant had been elected an elder in the church; and about the time they were to elect deacons and elders. Before the conversation, the domine had refused to call off the defendant a third time, which was necessary to warrant his ordination. The conversation was after the death of the child. The expression, "make it away," or "put it away," is the same in Dutch. *Peggy* had been living off and on at the domine's, a long time. She was his wife's sister. The plaintiff had told the witness that the child was born at *Newark*; and he understood the plaintiff, that he went down to *Newark* with the girl; and that the plaintiff and defendant went down after the child was born. At a trial

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before the consistory, the plaintiff acknowledged that he and *Lansing Haring* had agreed to keep the matter concealed. The plaintiff said many plans were laid between them; but the last was adopted. The plans were, that the child was to be laid on the stoop; put on the street; put by blacks; and in the poor house. All the plans were talked of before the child was born. The domine admitted that the plan of going to *Newark* was laid by him, and adopted; and that the child, after it was born, was to be put out; and the mother was to return home. In connexion with the plan of the child going to the poor house, the plaintiff was to take the child at two years old.

The reverend *W. Eltinge*, being sworn as an intrepeter on the part of the defendant, translated the words relied upon by the plaintiff, as importing a wish to induce the defendant to kill or murder the child, as follows: "And then the domine would have, (or willed,) that the child should be made aside, (or out of the way,) the domine would have, (or willed,) that *Haring* and his wife should make that child aside, (or out of the way.)" He testified that the meaning of these words as used by *J. S.* and taken in connexion with the context, was no other than to make aside; to put out of the way; to secrete the child so as to hide the shame of the family; and if any other meaning should be attached to them, it would be a forced one; an indirect meaning; but the meaning is the same as the English words "put out of the way," or "make away with;" and must depend on circumstances. And the witness gave several illustrations of the meaning when applied to different circumstances.

The plaintiff then proved two other conversations with two different witnesses, the words of which were the same, as to *making away* with the child, as sated by the first witness; and one of the two last witnesses understood it to mean the same as the first.

To prove the special damages, the plaintiff then called *J. A. Johnson*, and asked him whether divers persons had not left the congregation in consequence of the reports against the plaintiff's character.

To this question, the defendant's counsel objected; 1. Because the plaintiff had not supported the averments in his declaration, that he was a clergyman, established, &c. over the church, as alleged; and had not made title to any income from that society; and 2. That he was confined in his proof to the damages specifically laid; and could not introduce proof, in support of the allegation, that divers other persons had refused to pay.

The judge decided that the plaintiff had proved enough as to his special character, to warrant the proof; and that it was admissible under the allegation in the declaration;

And the counsel for the defendant excepted.

The plaintiff then proved that he was duly licenced and ordained. His licence was produced and read. He also proved his call from the church of *West New-Hampstead* and *Ramapo*, an incorporated religious society, dated the 16th of *November*, 1808, at a certain salary and privileges; which call was accepted, and he regularly installed, pursuant to the call.

*Johnson* was again called; but did not state any special damage.

The plaintiff, however, rested; and

The defendant's counsel insisted that the plaintiff should be called, inasmuch as no special damages had been proved; and the words were not actionable in themselves.

The plaintiff's counsel insisted that the words were actionable in themselves, even if spoken of an ordinary person; and especially so, when spoken of a clergyman as such.

The judge decided, that the words imputing a want of chastity, or charging him with committing fornication, were not actionable, *per se*;

That there was no evidence of special damage;

But that the charge, made by the defendant, that the plaintiff desired him "*to make away with the child*," or "*make the child away*," or "*make the child out of the way*," if made in the sense charged in the declaration, were actionable in themselves; that the sense or meaning, in which those words were used by the defendant, was pro-

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per matter to be submitted to the jury ; and that there was sufficient evidence to carry the cause to the jury upon this point. That whether the *innuendoes* were well laid, was matter appearing upon the face of the record ; and it was not competent for him to pass upon it. But there was sufficient evidence of their truth to carry the cause to the jury, upon that point also.

He, therefore, refused to nonsuit the plaintiff ; and the defendant's counsel excepted.

Verdict for the plaintiff.

*E. Williams*, for the defendant, now moved in arrest of judgment, or for a new trial on the bill of exceptions.

In arrest, he took the following grounds :

1. That the words laid are not actionable in themselves.
2. They are not alleged to have been spoken of the plaintiff, in relation to his profession, trade or calling.
3. The innuendoes are not justified by the words as laid.
4. The first and second counts contain no allegation of special damages ; and the verdict being general, the judgment must be arrested.

He observed, that the words could not be enlarged by the innuendo ; (1 *Saund.* 343, note (4) ; 8 *John.* 109 ; *Starkie on Slander*, 302, *Am. ed.* ; 1 *Chit. Pl.* 383 ; ) and there is no colloquium, nor any averment that a child had been born, or murdered or killed ; or that there had been any attempt to kill a child. The illegitimacy of the child is not averred ; nor whether the girl was married or single. The words, "that the domine had desired the defendant to make away with the child," are, without any authority, made by the innuendo an attempt to procure the defendant to murder it. The defects should have been supplied by proper averments. (*Starkie on Slander, Am. ed.* 302, 304.)

In support of the motion for a new trial, he made these points :

1. The words in the declaration are not proved.
2. The averment that the plaintiff was installed the clergyman of the congregation at *Kakiat*, was not supported by the proof ; and the evidence of damage, in that charac-

ter and office, was improperly admitted. (*Herrick v. Lap-  
ham*, 10 *John*. 281.)

3. The words proved, are not actionable in themselves, taken in their ordinary acceptation, as they must be. (9 *East*, 93.)

4. The innuendoes are not justified by the words laid or proved; and the point, whether they were proved should not have been submitted to the jury.

He observed, that instead of one, the plaintiff is proved to have been settled the minister of two churches; neither of them the church stated in the declaration. And though he failed as to special damages, he had the full benefit of this evidence with the jury. It varied from the declaration, which avers a settlement over one church only, naming it.

Then it comes to this: does the slander import a crime punishable as a felony? It charges a mere *wish* to destroy the unborn infant, or a *desire* that it should be destroyed; certainly nothing beyond this. No overt act is charged. (*Starkie on Slander*, *Am. ed.* 89.) A mere wish to commit a felony will not sustain an indictment; nor would a request. (*Starkie on Slander*, *Am. ed.* 89, 21, 22, 23, 66, 67.)

It cannot be pretended that the words, as laid, imported any thing more than a wish to hide or secrete the child. The words, according to the construction of them, proved, or sought to be proved at the trial, imported a wish to kill or murder. This was one variance.

If there are any material words proved, in order to make out the charge, beyond what the declaration contains, this is a variance. The declaration should have stated them by way of colloquium or otherwise. (*Starkie on Slander*, *Am. ed.* 302, 304.) If the words, "the child has a soul to gain or lose," be material to make out the sense contended for, they should have been stated.

*T. J. Oakley* and *T. A. Emmet*, contra, made the following points:

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1. The words laid are actionable in themselves. After verdict, they must be taken to have been spoken in the sense alleged in the declaration.

2. They are actionable on account of the professional character of the plaintiff.

3. They are actionable on the ground of the special damage alleged, which, on the motion in arrest, must be taken to have been proved. (*Harley v. Herring*, 8 T. R. 130. *Starkie on Slander*, Lond. ed. 191.)

4. The innuendoes laid cannot vitiate. They may be rejected as surplusage, if not necessary to support the action. (*Smith v. Cooker*, Cro. Car. 512. *Lindsey v. Smith*, 7 John. 359.)

They insisted, that the allegation of special damage must be taken to apply to all the counts. It does so in terms, though it comes in at the conclusion. It was not necessary to repeat it at the close of each count.

When words are equivocal in themselves, an innuendo is proper to fix the criminal meaning. (*Wilner v. Hold*, Cro. Car. 489. *Starkie on Slander*, 339, 341.) The words, "to make away," are of that character; and may be thus explained. They are not necessarily innocent on their face. They are, in English, understood to mean killing or murder, when applied to a child, oftener than any thing else. And in *Falkner v. Cooper*, (Carter, 55-6) *these very words were held actionable*. At any rate, the words cannot always mean the mere act of secreting. If the words *may* import criminality, then the verdict fixes the intent, and must be sustained. The jury have found the meaning. After a verdict for the plaintiff, the words shall be taken in their worst sense. (*Starkie on Slander*, Lond. ed. 65.)

Words importing a solicitation to commit a felony are actionable. "He wished me to make away with the child," is, in one sense, the charge of solicitation to do it. For this the plaintiff, beyond all doubt, would be punishable in the temporal courts. (*Passie v. Mondford*, Cro. Eliz. 747. *Preston v. Pinder*, id. 308. 2 Chit. Cr. L. 117,

note (y). *id.* 50, 993. *Mayne v. Digle*, *Freem.* 46. *Ham. N. P.* 300, 301.)

Taken together, the language charged, plainly imports that the child was illegitimate; and imputes to the plaintiff a want of chastity; a lewdness which unfits him for his duties as a clergyman; and destroys his professional character. Words to this effect, spoken of a clergyman, were held actionable in *Dod v. Robinson*, (*Aleyn*, 63.) They are then actionable on the principle which makes any words so, as affecting a man in his particular profession or calling. The example usually put, is that of charging a lawyer with being a knave. To charge a blacksmith with keeping false books, would be actionable for the same reason. To say of a clergyman, he is a drunkard, is actionable. (*M'Millan v. Birch*, 1 *Bin.* 178. *Chaddock v. Briggs*, 13 *Mass. Rep.* 249, *S. P.*) The court cannot but see that a charge of incontinency would affect a clergyman in his profession; though it would not have that effect when made against an ordinary person. In this country, clergymen of all denominations have the same right to protection as the established clergy in *England*. (1 *Bin.* 184-5. *Starkie on Slander*, *Am. ed.* 107.)

Where words are equivocal, it is sufficient to state them in the declaration, point them with an *innuendo*; and then prove the truth of the *innuendo* by circumstances. Nothing is more common than to prove words not laid, in order to show the sense in which those which are laid, were spoken. The declaration need not be loaded with the particulars. Words are always to be taken as they are understood by the hearers. (*Cooper v. Smith*, *Bridgm.* 60.)

After proof of special damages had failed, further proof was admitted. This was not objected to at the trial; and its admissibility cannot be questioned here. The proof of settlement over two churches instead of one, as alleged in the declaration, was a part of this unquestioned proof. The court will intend that the two churches spoken of are in truth but one; and that this is the same church mentioned in the declaration. This might have been shown, if there

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had been an objection at the trial. The defendant's counsel should have put his finger upon the variance.

There was no ground for a nonsuit. The words alleged were substantially proved. This is sufficient. The proof need not literally correspond with the words set forth in the declaration. It was sufficient to carry the cause to the jury, that some of the witnesses understood the words to import criminality. The jury were to determine the sense of the words. They are always to do this, if there be any ground for doubt. (*Dexter v. Taber*, 12 *John.* 239. *Ex parte Baily*, 2 *Cowen*, 479, 482. *Goodrich v. Woolcott*, 3 *Cowen*, 231, 239, 40.)

That the *colloquium* in the declaration need not apply the words spoken particularly to the professional character of the plaintiff; but that it is sufficient to apply them in proof, the counsel cited *Stanton v. Smith*, (*Ld. Raym.* 1480;) *Reeve v. Holgate*, (2 *Lev.* 62;) *Sir John Isham v. York*, (*Cro. Car.* 15;) *Taylor v. Starkey*, (*id.* 192;) *Webb v. Nicholls*, (*id.* 459;) *Fleetwood v. Curle*, (*Cro. Jac.* 557;) *Carn v. Osgood*, (1 *Lev.* 280;) *Goodyear v. Bishop*, (*Cro. Car.* 265;) *Cawdry v. Highley*, (*id.* 270;) *Foule v. Robbins*, (12 *Mass. Rep.* 498;) and *Chaddock v. Briggs*, (13 *id.* 249.)

*Williams*, in reply. The first and second counts are complete in form; and profess to rely on themselves. The allegation of special damage at the conclusion of the declaration, cannot be attached to them. If it was intended to support them on that ground, they should each have charged the special damage individually and distinctly. As inserted, it cannot aid any beside the third and last count. If this be not so, where do these counts begin? Where do they end?

We deny that doubtful words can be helped by an innuendo. This can be done only by a *colloquium*. (*Starkie on Slander*, *Am. ed.* 302.)

The authorities cited to show that the act of solicitation is legally criminal, do not apply to a case of this kind. A solicitation to kill, in order to be criminal, must relate to a

living person. The declaration does not aver that the child was born, or had even quickened in the womb. The wish, or request, or solicitation insisted on, therefore, could not relate to a felonious killing. It could be no more than a request to commit a misdemeanor. This is not an offence indictable at all.

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There is no more reason why words, importing a want of chastity, should be deemed actionable, when spoken of a clergyman, than of the advocate, the judge, or the physician. In neither case are they actionable. Even the female is not protected by the law against such an imputation; though no one is so much injured by it.

*Curia*, per SAVAGE, Ch. J. (After stating the facts.) With regard to the motion in arrest, the enquiry is, whether the words, as laid, are actionable; for, on this motion, we are to take it for granted that they were proved as laid; and with the intention imputed.

The doctrine of construing words in *mitiori sensu*, has been exploded; and a more rational rule now prevails: that words are to be understood according to their plain and natural import; according to the ideas they are calculated to convey to those to whom they are addressed. (*Goodrich v. Woolcott*, 3 Cowen, 239-40, and cases there cited.) Mr. Starkie, in his valuable Treatise on Slander, (p. 44,) states the rule as follows: "Both judges and jurors shall understand words in that sense which the author intended to convey to the minds of the hearers, as evinced by the whole circumstances of the case. It is the province of the jury, where doubts arise, to decide, whether the words were used maliciously and with a view to defame; such being matter of fact, to be collected from all concomitant circumstances; and for the court to determine, whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action." Courts and juries will understand them in the same way that other people would. (*Walton v. Singleton*, 7 Serg. & Rawle, 461.)

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The jury have found that the words were spoken maliciously, and with a view to defame and injure the plaintiff, as laid in the declaration. If they had been spoken otherwise, the verdict would have been different.

What idea, then, do we, and all persons of common understanding, receive from the charge, that the plaintiff wished the defendant *to make away* with a bastard child, of which he was the father, and standing in the relation of brother-in-law to the mother? What must have been his motive, but to prevent entirely, and in the most effectual manner, a public exposure of his misconduct; that he might avert disgrace and infamy? I apprehend the plain meaning is, that the plaintiff wanted the defendant to destroy this infant child as soon as born. Does this charge, then, amount to an offence which is punishable, and one involving moral turpitude? It is not necessary, here, to say whether it be actionable, in general, to impute evil inclinations or wishes. It is sufficient to take the rule as established, that the charge must impute some act constituting a crime or misdemeanor, for which corporal punishment may be inflicted in a temporal court. (*Starkie on Slander*, 41.)

Is it not a high misdemeanor, for one person to apply to another; and solicit him to commit murder? There is, in such an act, something more than wickedness of intention. There is an act tending to carry such evil intention into effect. (*Passie v. Mondford*, Cro. Eliz. 747. *Preston v. Pinder*, id. 308.)

According to my understanding of this charge, in the declaration, the words are actionable in themselves, whether spoken of a clergyman or any other person.

There are other words, however, laid, which, spoken of individuals in general, would not be actionable; and it is objected that they are not so, when spoken of a clergyman.

The words convey a direct charge of incontinency.

It is familiar to all, that words not actionable in themselves, become so by being spoken of persons engaged in a particular calling or profession. Thus, to call a lawyer a knave, or a physician a quack, is actionable. So, also, to

call a merchant a bankrupt. And the action seems to extend to words spoken of a person in any lawful employment, by which he may gain his livelihood. (*Starkie on Slander*, 108.)

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It has been contended, that this rule does not extend to clergymen ; and there are some cases which look that way ; but there are also cases and *dicta* of learned men in favor of the action.

The oldest case to which we have been referred, is *Dod v. Robinson*, (*Aleyn*, 63 ;) in which it was held, that, to say of a clergyman "he is a drunkard," was actionable ; drunkenness being an offence for which a clergyman is liable to be deprived of his preferment. So, he is a rogue and a dog. (*Pocock v. Nash*, *Comb.* 253.) So, he is a rogue and a contemptible fellow. (*Musgrave v. Bovey*, *Str.* 946.) These cases are cited by *Starkie*, in his Treatise on Slander, 107. *Hammond*, in his Treatise on the law of *nisi prius*, (p. 300,) says, To charge a man with seduction, adultery and such like, or to impute to him criminal inclinations, is not defamatory, and the reason assigned is, because he is not thereby exposed to the vengeance of the law. He further states, that words actionable in relation to one's profession or trade, are such as impute to him the want of those qualifications which are essential. As to attribute knavery to a lawyer, ignorance to a physician, *profligacy* to a *Divine*, cowardice to a soldier, or dishonesty to a tradesman. In *M'Millan v. Birch*, (1 *Bin.* 184,) *Tilghman*, Ch. J. says, "The reason why certain expressions are actionable, when applied to persons of certain professions, is this ; that from the nature of the case, it is evident that damage must ensue. So, to say of a clergyman, that he is a drunkard ; because these words, if believed, must deprive him of that respect, veneration, and confidence, without which he can expect no hearers as a minister of the gospel." The temporal damage arising from a loss of reputation for moral rectitude, in his profession, is as great to the clergyman as to a lawyer. Then, why is it, that the former should not be equally protected



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in his character with the latter? Finding such respectable authority for the position, I am decidedly in favor of holding words, importing a charge of incontinency against a clergyman, actionable.

Being of opinion that the words are actionable, a part in themselves, and a part in respect to the plaintiff's profession, it is useless to consider the nature and office of an innuendo; or to inquire whether special damages are laid as to more than one count.

The judge correctly decided, that the sense in which the words were used, was proper to be determined by the jury.

In my judgment, both the motion in arrest, and for a new trial, must be denied.

Motions denied.

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THALLHIMER *against* BRINCKERHOFF, Gentleman,  
one, &c.

T., having title to land held in possession by others, made an agreement, not void for champerty or maintenance, in consideration of TA's agreeing to furnish pecuniary assistance about recovering the land, that he would convey one fourth of the land which should be recovered, to TA. T. appointed B. his attorney to conduct suits for the recovery of the land. The suits were finally compromised by T. who conveyed to the possessors by various deeds executed by B. as his attorney, which deeds acknowledged the receipt of the consideration money.

*Held*, that an action for money had and received, would lie against T. if he had received the money, in behalf of TA. for one fourth of the money so received by T. But B. having received the money, *held*, that the action lay against him.

*Held*, also, that the deeds executed by B., as attorney for T., were *prima facie* evidence that B. had received the money.

What is sufficient evidence, that B. knew of TA's claim under the contract.

What is sufficient evidence, that TA. knew of B.'s paying over the whole proceeds of the compromise to T.; and that he (TA.) acknowledged T. as his agent to receive the proceeds; and looked to him for his, TA.'s share of them, and not to B.

Where an agent is authorized to receive money for his principal, or do any other thing, his drafts, receipts, account stated, or admissions relative to the subject of his agency, and especially when all these are offered in connexion, constitute a part of the *res gestæ*; and are competent, though not conclusive evidence against the principal.

Due notice being given to produce a letter, written by one party to another; and the latter refusing to produce the letter; the former offered to prove by his clerk that he copied the letter into a letter book, and that it was his invariable custom to carry letters, thus

At the trial an agreement was given in evidence between the plaintiff and one *Henry R. Teller*, dated *April 10th, 1807*. This agreement recited a claim to certain lands by *Teller*, to whom the plaintiff was related ; and provided, that on its recovery, the former would convey to the plaintiff one fourth of it. *Teller* made the defendant his attorney, for the purpose of recovering the land ; but instead of actually taking possession of it, the claim was compromised between *Teller* and the possessors, who paid a large sum of money, which came to the hands of the defendant ; and for one fourth of which this suit was brought. (See the agreement more at large, 20 *John*. 386, where its legality came in question. It was adjudged legal, 3 *Cowen*, 623, *S. C.* on error.)

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On the compromise, various deeds were executed, by the defendant, as the attorney of *Teller*, of different parts of the land, expressing the consideration received in money ; and these were offered by the plaintiff, and admitted, (though objected to,) as evidence, *prima facie*, that the defendant had received the money.

The judge overruled a motion for a nonsuit, made on the ground that the action for money had and received would not lie at the suit of the plaintiff.

The defendant set up in his defence, that he knew nothing of the agreement between the plaintiff and *Teller*, until after he had paid to or for *Teller*, and the latter had discharged him from all the moneys he had received ; and that *Teller* was in truth the agent of the plaintiff, to receive the money, or otherwise discharge the claim for it. Among other evidence to show this, he offered to prove

copied, to the post office ; and seldom handed them back ; held, that this was sufficient evidence of sending the letter, though the clerk could not recollect that he sent the particular letter ; and that a copy was admissible in evidence.

Where letters are written in the course of business or negotiation by an agent, they are evidence against his principal, so far as they relate to the subject of his agency ; but no farther.

Where mortgages are assigned, or conveyances executed, acknowledging the receipt of the consideration by the assignor or grantor, this is, *prima facie*, evidence that the consideration was actually paid, as expressed ; and this, too, although the assignor or grantor was at the time indebted to the assignee or grantee, to the amount of the consideration expressed. The assignments or conveyances shall not, for that reason, be taken to have been in satisfaction of the debt.

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a correspondence between himself and the son of the plaintiff, *Barent Thallhimer*, who, he insisted, was the agent of the plaintiff. This correspondence was offered particularly to show, that long after the defendant had received the money, this being known to the plaintiff, he had acknowledged himself indebted to the defendant on mortgage; and had set up no claim for the moneys in question. Notice had been given to the plaintiff, to produce the letters written by the defendant; but the judge rejected his letter book as evidence; though the plaintiff declined to produce the letters called for by the notice. The offer of the letter book was accompanied with evidence which will be found detailed in the opinion of the court.

Various mortgages taken by the defendant on the sale of the real estate, payable to *Teller*, had been assigned by the latter to the defendant, for a consideration expressed in the assignment to have been received by *Teller*. The registry of these assignments was offered in evidence against the defendant, but rejected.

The judge admitted in evidence, though objected to by the defendant, certain conveyances of land from *Teller* to the defendant, in which a consideration was expressed to have been received by *Teller*.

The defendant offered in evidence certain receipts, drafts, and an account stated by *Teller*, showing the receipt of, and final settlement for the money in question; which were rejected by the judge.

The defendant excepted to the various decisions of the judge, which were against him.

The verdict was for the plaintiff, for upwards of \$13,500; and the cause now came here on motion by the defendant for a new trial, on the bill of exceptions; and also on a case made.

The above is a very slight outline of the facts to which the points of law decided by the court relate.

To say more of the facts here, is deemed unnecessary; as they will be found sufficiently stated in the opinion of the court.

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to be void as against the act, (1 *R. L.* 172,) to prevent champerty and maintenance. (20 *John.* 386.) But the court of errors reversed that judgment and established the validity of the contract. (3 *Cwen*, 623.) Whether that agreement was void or not, was the only point which strictly and properly arose upon the bill of exceptions. But the counsel discussed, and the court of errors expressed an opinion upon the question, whether, admitting the agreement to be valid, an action for money had and received could be sustained by the plaintiff. And although that opinion cannot be considered as settling the point on the ground of authority, it is entitled to great weight in the consideration of the question.

It was obviously the intention of *Teller* to give to *Thalhimer* a right to one fourth part of whatever might be recovered in the suits, which the agreement recites he was about to commence. The inducement to the agreement was not only a natural and meritorious one, but the consideration on which it was founded was valuable, and such as, under all the circumstances of the case, made the arrangement an act of prudence and discretion on the part of *Teller*. It was foreseen that the controversy would be protracted and expensive. Its result could not be anticipated with certainty; and *Teller* knew, if he should fail to recover, that the costs and expense of the controversy would be enormous. He acted wisely, therefore, in guarding against a result that would have been so ruinous, by the agreement which he made with the plaintiff. If the suits had proceeded to judgment, and the land had been recovered, *Teller* was expressly bound by his covenant to convey one fourth part of the property to the plaintiff. The agreement made no express provision for the case of a compromise. But the legal title being admitted to be in *Teller*, he had a clear right to discontinue, or settle the suit, on such terms as he pleased; and if he acted with good faith, and under the advice of counsel, all that the plaintiff could require, would be to participate in the fruits of the compromise, in the same proportion to which he would have been entitled if the land itself had been recov-

ered. If the money had been payed to *Teller* upon the compromise, whether he had a right to compromise or not, there can be no doubt, that *Thalhimer* might have affirmed the settlement, and recovered from him one fourth of the amount. It would work the grossest injustice, to give to the agreement a construction which would enable *Teller* to defeat its beneficial operation, so far as the plaintiff is concerned, by a settlement; and then to answer the plaintiff's claim by saying that his contract bound him only to convey one fourth of the land recovered, and not to pay one fourth of the money received in lieu of the land. The sense of the contract evidently is, as remarked by the chancellor, (3 *Coven*, 649,) that in the event of success, *Thalhimer* shall have one fourth part of the property, whether the fruits of the claim shall be realized in land or money.

If an action for money had and received could have been sustained by the plaintiff against *Teller*, on the money being paid to him, I perceive no reason why it cannot, against the present defendant, admitting the money still to be in his hands, or to have been paid over to *Teller* without the authority of the plaintiff, either express or implied. It is no objection to the action, that *Thalhimer* was to bear a proportion of the expenses of the controversy. It may be questioned whether, according to the true construction of the contract, he was to pay any thing before the termination of the suit; for the agreement provides, that *if the suits should be unsuccessful*, he should pay half the expenses; *but if Teller should recover*, then only one fourth of them. Pending the controversy, therefore, what proportion was he to advance? The testimony of Mr. *Emmet* renders it probable, that when this agreement was made, it was understood between the parties and their counsel, that a very small proportion, if any, of the costs, were to be paid, until the final termination of the suits. He expressly says, that such was the agreement in relation to the counsel fees; and that they were not paid until after the compromise. The attorney's fees, it is evident, were

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not advanced by *Teller*; for *Brinckerhoff* now claims the \$15,000 at which they were liquidated, and paid by the defendants in the suits. But if they had been previously paid by *Teller*, that amount would belong to him, and not to *Brinckerhoff*. It is clear, therefore, that little or nothing was paid by *Teller* or *Thalhimer* while the suits were pending; and that there can be no account between them in relation to the costs, to be liquidated and adjusted. The costs are to be deducted from the \$75,000 agreed to be paid by way of compromise; and the plaintiff is entitled to one fourth of the balance, either from *Teller* or the defendant.

I think the evidence warrants the conclusion, that the agreement between *Teller* and *Thalhimer* was known to the defendant. It was in the hand writing of his clerk, and witnessed by him and the defendant. The parties, therefore, were probably together in his office; and it is irrational to suppose that an arrangement in which the defendant might eventually have so deep an interest, and which there was no possible reason for concealing, was not communicated to him. He was probably, at that time, if he had not previously been, retained as attorney in the suits, which the agreement recites it was the intention of the parties to commence. A contract of so much importance, must have been a matter of conversation and discussion between the parties, at least, before it was finally concluded; and under all the circumstances of the case, the fair, and I think, the irresistible presumption is, that the defendant was fully apprised of all its provisions.

The next inquiry is, whether *Teller* was authorized by the plaintiff to settle with the defendant for his share of the recovery, (assuming for the present that such settlement has in fact been made.) It is not necessary that there should have been an express authority for the purpose. If the plaintiff has subsequently recognized or ratified the acts of *Teller* in that respect, it is equivalent to an original express power to perform those acts.

The power of attorney from *Teller* to the defendant, under which the suits were compromised, bears date the

22d of *December*, 1813; and the compromise itself took place in the following month. The deeds which are proved to have been given, bear date from *December*, 1813, to the following *April*. Independent of all evidence, it is incredible, that *Thalhimer* should not have known of the settlement in which he had so deep an interest. It was a matter of general notoriety. The suits affected a large number of individuals, and we have had very few controversies in our courts, the progress and termination of which were more generally known. It is not to be believed that the plaintiff, who resided within twelve miles of the city of *Albany*, where he had a son engaged in active business, and much nearer to *Schenectady*, where *Teller*, his brother-in-law appears to have lived, was not informed both of the fact, and the terms of the settlement, about the time when it was effected. And yet no application is made by him to the defendant for his share of the proceeds of the settlement; nor any intimation given him of his intention to call him to an account, until 1821, when this suit was commenced. How is this to be accounted for, except upon the supposition, that the plaintiff considered and acknowledged *Teller* as his agent, and was content to leave the final settlement, as he appears to have done the previous measures, to his judgment and discretion, and to look to him, and not to the defendant, for his share of the proceeds?

This view of the case derives strong confirmation from the circumstances attending the foreclosure of *Brinckerhoff's* mortgage against the plaintiff. The mortgage was foreclosed in 1816, for the non-payment of the interest. Many letters passed between the parties, from 1816 to 1818, pressing for payment on the one side, and begging indulgence on the other. But not an intimation is to be found of any claim on the part of the plaintiff against the defendant, in relation to the *Teller* property. Among the various suggestions made by the plaintiff, to avoid the ruinous consequences which he apprehended from a foreclosure of the mortgage, no allusion whatever is made to the fund in question, as laying the foundation either of a

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legal or equitable claim against the defendant. The correspondence, from the first to the last, admits the justice of the demands, and entreats only for forbearance.

Assuming (what I have endeavored to show must have been the fact,) that the plaintiff knew of the compromise at the time it was made; is it credible that he remained uninformed and ignorant of the subsequent transactions between *Teller* and *Brinckerhoff*? He must have known, (if such was the fact,) that *Teller* was assuming to act for him, as well as for himself, in the settlement with *Brinckerhoff*; and, considering the origin of the plaintiff's interest in the fund, that it grew out of the voluntary act of *Teller*, who alone appears to have taken any part in the management or direction of the controversy, nothing was more natural than that *Brinckerhoff* should have supposed that *Teller* possessed the authority which he assumed, to settle the whole claim. And the plaintiff must, under all the circumstances of the case, be considered as having subsequently affirmed, if he did not originally authorize, his acts.

It was suggested, on the argument, that the reason of the plaintiff's omission to assert his claim against *Brinckerhoff*, was, his being advised by counsel, that the agreement between him and *Teller*, out of which his rights grew, was illegal and void. Admitting the fact, of which there is no evidence, it does not vary the case. It is immaterial to the defendant, what were the plaintiff's reasons for permitting *Teller* to assume the character and power of an agent. He did permit it; and upon him, and not upon the defendant, must the disastrous consequences, if any have ensued, be visited.

If *Brinckerhoff*, therefore, has fully settled with *Teller*, and paid over to him the whole amount received upon the compromise of the suits, it ought, upon every principle of law and justice, to be a bar to the plaintiff's claim.

Whether the evidence in the case shows such settlement and payment, is a question which I do not intend to examine; as I have come to the conclusion, that some material evidence, offered by the defendant upon this, as well



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*res gesta*, and is admissible in evidence against the principal. (3 *T. R.* 454. 7 *id.* 665. 1 *Esp. Rep.* 375. 4 *Taunt.* 511, 565, 663. 10 *Ves.* 128. 10 *John.* 44. 5 *Esp. Rep.* 74, 135. 2 *id.* 511, *note.* 2 *Campb. Rep.* 555. 1 *Phil. Ev.* 77. 2 *Wheat.* 380.)

In this case we are to presume that it would have appeared from the receipts and drafts themselves, or been otherwise shown, that they related to the fund in question. The account, I understand to have been offered in connexion with the drafts and receipts, and not as an independent piece of evidence; and that the admission of a balance due to the defendant was made at the time of the settlement of the account. They all related to, and were parts of the *res gesta* to which the agency of *Teller* extended.

This evidence, therefore, I think, ought to have been submitted to the jury. It was competent but not conclusive, against the plaintiff. He might have impeached it by showing either fraud or mistake on the part of *Teller*, in making the settlement. What weight the evidence was entitled to with the jury, is an entirely distinct question.

I do not understand the defendant to have offered his own answer to a bill in chancery, in evidence. The case states, that he offered to read in evidence, the account; copies of which are annexed to an answer of the defendant to a bill filed against him, &c. Neither the answer, nor the copies of the accounts, were offered in evidence. Why any allusion was made in the case to the answer, or the copies, does not satisfactorily appear. Perhaps the phraseology of the case is inaccurate, and the answer was in fact offered in evidence. If so, it was properly rejected.

The copies of the letters from the defendant to the plaintiff, contained in what is called the defendant's second letter book, should have been permitted to be read. The objection made to them, was, that it was not sufficiently proved that the original letters were sent according to their direction. *Westvelt*, the defendant's clerk, testified that the letters in the second book were in his hand writing. That it was his invariable practice, to carry the original



letters to the post-office, as soon as he had copied them in that letter book. That he very seldom handed them back. The accuracy of the copy was not questioned. The only objection was, that the evidence did not make out the fact, that the original was sent. It comes fully up to what Lord *Ellenborough*, in *Hetherington v. Kemp*, (4 *Campb.* 193,) held would be sufficient. There the fact to be established was notice of the dishonor of a bill; and the plaintiff proved that he wrote a letter to the defendant containing such notice; that the letter was put on a table, where, according to the usage of his counting house, letters for the post were always deposited; and that a porter carried them thence to the post office. But the porter was not called, and there was no evidence as to what had become of the letter, after it was put down on the table. Lord *Ellenborough* held this insufficient. But he remarked, "Had you called the porter, and he had said that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done." Now the clerk, in this case, does swear that it was his invariable custom to carry to the post-office the original of all the letters copied by him. In *Miller v. Hackley*, (5 *John.* 375,) the notary testified that it was usual for him, where the drawer or endorsers lived at a distance, to send a written notice of the dishonor of the bill to them by post, on the evening of the same day; and that he believed he had sent such notice in that way in the present case. This was held sufficient in the first instance. In such cases, too, strict proof is always required. (3 *Campb.* 305, 379. 2 *Ph. Ex.* 20, *note.*)

It was satisfactorily proved that *Barent Thallhimer* acted as the agent, and with the knowledge and approbation of his father, in his negotiations and correspondence with the defendant, upon the subject of his mortgage. So far, therefore, as his letters strictly relate to that topic, they are competent evidence against the plaintiff: no farther. The letters of the 5th of January, and the 6th of February,

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1816, are not of this description, and were properly excluded by the judge. The plaintiff's claims against *Teller* had no connexion with *Brinckerhoff's* mortgage; and an authority to his son to correspond with the plaintiff in relation to the mortgage, conferred no power upon him to bind or commit him by any representations or declarations that he might make in relation to other topics. There is no proof that he was the authorized agent of his father in the settlement of his demands against *Teller*. When he says, therefore, in his letter of *January 5th*, that in his opinion \$2000 will balance accounts between *Teller* and his father, he speaks without authority, and of course without effect. The same observations apply to the letter of the *6th of February*. The opinion of the master of the rolls in *Fairlie v. Hastings*, (10 *Ves.* 125,) is very clear and explicit on this point. And all the cases already cited upon the authority of agents to bind their principals, by their acts or declarations, are applicable here.

The acknowledgment contained in the deeds executed by *Brinckerhoff*, as attorney for *Teller*, that the consideration money expressed therein had been paid, was correctly held by the judge, to be *prima facie* evidence, that the money was actually paid to him. If such was not the fact, he had it in his power to show to whom it was paid, by calling the different grantees as witnesses. *Brinckerhoff* was properly allowed credit for all the mortgages given directly to *Teller*.

If the acknowledgment of the receipt of the consideration money in the deeds executed by *Brinckerhoff*, as attorney, is evidence of the payment of the money to him, then, upon the same principle, the consideration money of the mortgages assigned by *Teller* to *Brinckerhoff*, and for the different lots conveyed to him, must be presumed to have been paid by *Brinckerhoff* to *Teller*, as all those instruments contain a similar acknowledgment. There is nothing to show that those assignments and conveyances were made in part payment of *Brinckerhoff's* debt; and were not, as they purport, distinct and independent purchases. He cannot, therefore, be charged

with those sums. A case, however, involving so large an amount of property, ought not to be decided upon such slight presumptions, where evidence of a much more satisfactory character must be in the power of the parties.

I am not aware of any other point upon which it is important for the court to express an opinion.

New trial granted.

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Newkirk.

PETERS *against* NEWKIRK.

CASE, for distraining the plaintiff's goods, when no rent was in arrear, under the act (1 R. L. 436, s. 9,) tried at the Ulster circuit, October 14th, 1823, before BETTS, C. Judge.

Plea, the general issue.

It appeared, at the trial, that *Newkirk*, the defendant, had demised certain premises, being a grist-mill, fulling-mill, house, &c. to the plaintiff, for three years from the 20th of May, 1822, at 300 dollars rent *per annum*; payable out of the carding or fulling book; the defendant to have the privilege of taking the accounts as they stood, beginning either at the top or bottom. The lease provided that either party might determine it, on three months' notice previous to the end of the year. The witness who proved this lease, did not recollect distinctly when the rent was payable, though he thought it was at the end of the year.

On the 3d of February, 1823, the parties agreed to destroy the lease, and it was accordingly destroyed; and

An award made, without giving notice to the parties, so that they can be heard before the arbitrator, is a nullity.

An action does not lie on the statute, (1 R. L. 436, s. 9,) for double value of goods, &c. for distraining for more rent than is due, or for distraining for rent for which there is no right to distrain; but only for distraining where no rent whatever is due. If there be any, the least rent due, it protects the distrainor, tho'

he may be liable in some other form.

Where a lease is surrendered as to part of the premises, the right to distrain continues as to the residue.

Where rent is agreed to be paid at the end of the year; but before that time the tenant surrenders part of the premises; giving a due bill for the rent, payable presently; held, that the landlord may distrain for the rent immediately.

Rent may be payable in advance, and may, in such case, be distrained for when due.

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they struck a balance of the rent. *Newkirk* agreed to give off and deduct 60 dollars; and it was agreed in writing, that *Peters* should give up the possession of the grist-mill immediately, and retain possession of the house and barn, with the privileges under the first lease, till the 1st of *May*, 1823, and then leave possession; and that he might finish his cloth in the shop. The balance of rent due to *Newkirk*, was agreed to be \$87,75, for which *Peters* gave his due bill in these words: "Due, this 3d day of *February*, 1823, to *Christopher Newkirk* on a settlement for rent of the mill, fulling-mill, &c. the sum of eighty seven dollars, seventy five cents, &c." It was also agreed that *Newkirk* should take a shearing machine to be appraised by *C. Sturges*, in part pay of the due bill; and to be endorsed upon it; and on the 10th of *February*, 1823, he made the appraisement at \$85, at the request of the plaintiff, and in the absence of the defendant, who was not notified.

The defendant offered to show by *Sturges*, that in making the appraisal, he took the first cost of the machine, and deducted the damage occasioned by its use; but that in his opinion, the real value to a man engaged in the clothing business, was not more than 25 dollars. The evidence was objected to, and overruled by the judge.

The distress was made on the 6th of *February*, 1823, for the \$87,75, and on the 12th, after the appraisal of the machine, the plaintiff caused to be served on the defendant a copy of the appraisal, tendered him seven dollars, and demanded a return of the goods distrained. The defendant refused to return the goods, but proceeded to sell them.

The judge decided and charged the jury, that, to protect the defendant, it must appear, not only that rent was due, but that it was due with right of distress. That the jury must be satisfied that the due bill was given for the rent then in arrear, or made payable in advance by express agreement. That if the 85 dollars discharged all the rent due on the 3d of *February*, the plaintiff was entitled to recov-

er; but if, under the agreement of the parties, any rent was then due and in arrear, they should find for the defendant.

Verdict for the plaintiff \$92, single damages, the value of the goods distrained.

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*C. H. Ruggles*, for the defendant, now moved for a new trial. He said, that even if the \$85 was to be applied as of the 3d of *February*, there was still \$2,75 yet due, for which the defendant might distrain, and which would protect him from the penalty imposed by the statute, (1 *R. L.* 436, § 9.) There is an adequate remedy for an unreasonable distress. The statute gives the treble damages, only in a case where no rent whatever is due. Although the first agreement was uncertain, as to the time of payment, the second one changed it, and fixed the time at the 3d of *February*, the date of the due bill.

If the rent was in fact due, this was enough, whether there was a right to distrain or not. The statute applies to a case where no rent is due; not where the party mistakes his remedy. (*Woodf. L. & T.* 258, *Am. ed. id.* 395, *Lond. ed.*)

But the whole \$87,75 was due. The award or appraisal of *Sturges* was void for want of notice to the defendant. (4 *Dall.* 232.) At any rate, evidence should have been received to show the false basis on which the arbitrator made his appraisal.

*J. Sudam*, contra. The rent, as originally reserved, was not of a nature to be the subject of a distress. The reservation was void. (*Shep. Touch.* 80.) But if otherwise, here was no rent in arrear when the distress was made. The original rent had not yet fallen due; and the mere act of giving the due bill did not change the time of payment. But if it did work a change as to the time, we say the situation of the parties was changed by the new agreement. The relation of landlord and tenant ceased for the purposes of a distress. (1 *T. R.* 441. *Bain v. Clark*, 10 *John.* 424.) And there was no new agreement which

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gave a right to distrain. It was left to the jury upon this question; and they found there had been no change as to the time. In this view, it was immaterial whether the appraisal by *Sturges* was valid or not.

Ruggles, in reply. *Bain v. Clark* was the case of a distress after a total surrender of the lease. Here a new lease was substituted, and the rent was payable immediately.

Curia, per WOODWORTH, J. The evidence as to the basis of *Sturges'* appraisal should have been received. The appraisal was irregular; and not conclusive on the defendant. Both parties should have had notice; so that an opportunity might be afforded to submit their remarks to the appraiser, and adduce proof, if deemed necessary. (4 *Dall.* 232.) The plainest dictates of natural justice require that no man shall be condemned unheard. The right to notice was implied in the agreement to submit. As the appraisal was, in my view, a nullity, the value of the machine was a proper subject of inquiry at the trial, in order to decide whether any rent was due.

If, however, the appraisement be allowed, there remained a small balance due. The question in this case seems to be, not whether the defendant took an unreasonable distress; but simply whether any rent was due. The count on which the plaintiff recovered is clearly founded on the 9th section of the "act concerning distresses," &c. (1 *R. L.* 436;) which provides that whenever a distress and sale shall be made by color of the act, for rent pretended to be in arrear, when in truth "no rent is in arrear or due," the party shall render double the value of the goods. The fact being conceded that some rent was due, this action cannot be sustained, unless the charge of the judge be correct, that there must also be a right of distress.

If it be admitted that the defendant had no right to distrain, the answer is, the plaintiff does not claim to recover on that ground. The statute remedy is relied on. If the case is brought within the statute, the damages are reg-

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I perceive, therefore, no ground to question the authority to distrain. (*Cornell v. Lamb*, 2 Cowen, 652.)

This case is clearly distinguishable from *Bain v. Clark*, (10 John. 432.) There the tenant surrendered the lease, and quit the premises. The relation of landlord and tenant having ceased, the personal responsibility of the tenant, on his agreement to pay, alone remained.

The verdict must be set aside; and a new trial granted, with costs to abide the event.

New trial granted.

COOK *against* SATTERLEE and SATTERLEE.

The essential qualities of a bill of exchange, or promissory note, are, that it be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and that it be for the payment of money only; and not for the performance of any other act; or in the alternative.

An instrument in writing, by which A. directs B. to pay C. or bearer, 400 dollars, and take up A.'s note of that amount, though the instrument be accepted by B. is not a bill of exchange.

ON demurrer to the declaration. The plaintiff declared in *assumpsit*, that on the 25th day of July, 1825, W. F. and C. E. Clarke, according to the usage and custom of merchants, &c. made their certain bill of exchange, &c. dated on that day, directed to the defendants, by which they requested the defendants, 90 days after date, to pay to the plaintiff, or bearer, 400 dollars; and take up their note given to William and Henry B. Cook for that amount, dated April 19, 1825; which bill the defendants on the same day accepted, according to the usage, &c.

General demurrer and joinder.

E. Cowen, in support of the demurrer, insisted that the instrument set forth was not a bill of exchange. That the object was special; and an acceptance imposed not only the obligation to pay the money, but do a farther act; the taking up of the note. Nor was it for the absolute payment of money. The acceptors might exact the note, before they would be obliged to pay the money.

E. Griffin, contra, cited *Chitty on Bills*, 41, 61; 1 Str. 706; *Bull. N. P.* 270; and 8 John. 485.

Curia, per SAVAGE, Ch. J. The essential qualities of a bill or note, are 1. That it be payable at all events; not



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Lathrop.

CHAPMAN and SCHOOLCRAFT *against* LATHROP.

Where goods are sold, to be paid for in cash, no time being agreed on for the payment, both the delivery and payment are simultaneous acts; and the vendor may refuse to deliver without actual payment; the latter being a condition of the sale.

But if he deliver without payment, the property passes, and the condition is waived; and tho' the vendee afterwards refuse to pay, trover will not lie for the goods.

Otherwise, it seems, where they are obtained by the fraudulent contrivance of the vendee.

If the goods be delivered without payment, the vendee may avail himself of a set-off against the vendor.

*Per Savage, Ch. J. delivering the opinion of the court.*

If the vendee become bankrupt, the vendor may stop the goods in transitu. *Per Savage, Ch. J. delivering the opinion of the court.*

TROVER for a hogshead of rum, a hogshead of sugar, and a box of raisins, tried at the *Albany* circuit, *September 15, 1824*, before DUEK, C. Judge.

The following facts appeared at the trial; on the 6th of *May, 1824*, the defendant called at the plaintiffs' store, and inquired for the articles in question. Being informed by *Schoolcraft*, one of the plaintiffs, that he had them, the defendant told him to put them as low as he could, and he, the defendant, would pay for them in cash, or current bills. *Schoolcraft* replied that, on those conditions, he would sell them as low as he could. On the same day, the goods were delivered to the defendant, who took them to his store on carts. The next day the defendant's clerk called on the plaintiffs to pay for them; and offered a note which had been endorsed by the plaintiffs, and regularly protested, proposing to pay the balance in cash. The plaintiffs refused to receive the note; and about a fortnight after demanded the property of the defendant, which he refused to deliver.

The note had been drawn by one *Northrop* payable to the plaintiffs, or order; and was endorsed by them to *Isaiah Shaw*. It was given for horses purchased of *Shaw*, which *Northrop* took to *Boston*, and there delivered them to one of the plaintiffs. The note had been discounted at the *Albany* bank; and taken up by *Shaw* after protest.

The defendant offered to prove that the plaintiffs had endorsed notes to a large amount for *Northrop*, had received from him the property purchased with those notes, and then stopped payment, with the avowed intention of preventing the holders from collecting them.

This testimony was objected to, and overruled.

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The testimony offered by the defendant, and overruled, should have been received. It went to show that the plaintiff had not been damnified. The measure of damages in trover is not always the value of the goods. (5 *Mass. Rep.* 104, 5, 6.) The note of the party was equivalent to cash; and better than bank bills. (5 *Mass. Rep.* 299.) An individual as well as a bank is bound to take his own notes in payment. Promissory notes are often considered as cash. (8 *John.* 206. 11 *id.* 468.)

Demand and refusal is no evidence of a conversion, where there is a good excuse for not complying with the demand. (5 *Burr.* 2826.)

*S. S. Lush*, contra, cited *Allison v. Matthieu*, (3 *John. Rep.* 235;) *Ogden and Murray v. Burling*, (10 *id.* 172, per *Thompson, J.*;) *Hunn v. Bowne*, (2 *Caines' Rep.* 38;) and *Van Cleef v. Fleet*, (15 *John.* 147.)

He said these cases, together with that of *Woodworth v. Kissam*, (15 *John.* 186,) establish beyond all doubt, that where the creditor obtains possession of his debtor's goods by fraud, the property is not changed; and the debtor may maintain trover for them: and that what circumstances are necessary to make out the deception, are matter for the jury. He also cited *Parker v. Norton*, (6 *T. R.* 695.)

In *Palmer v. Hand*, (13 *John.* 434,) the doctrine is explicitly laid down, that where goods are to be paid for on delivery, the vendor has a lien; so that if they be actually delivered to the vendee, and, on demand, he refuses to pay, the property is not changed, *the delivery being conditional.*

The testimony offered by the defendant, and rejected by the judge, was irrelevant.

*Hamilton*, in reply, said, that *Palmer v. Hand* was a case of gross fraud; and there was no actual delivery or acquiescence by the vendor, as in the case before the court.

*Curia*, per *SAVAGE*, Ch. J. The principal question is, whether trover will lie upon the facts proved.

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if the goods had been sold or attached while in possession of *T. & W.* According to the doctrine of this case, the absolute delivery of the property is a waiver of any condition antecedently made.

In *M'Carty v. Vickery*, (12 *John.* 348,) this court decided that trespass would not lie, where the vendor had parted with the possession, even though by fraud. They add, the property was changed by the delivery.

In 5 *T. R.* 231, Mr. Justice *Buller* cites the case of *Haswell v. Hunt*, where *Lacey*, in the morning, purchased some tobacco of the plaintiffs, to be paid for in cash; and then went off to *France* to absent himself from his creditors. The tobacco was delivered by the plaintiffs' servants, at *Lacey's* house, without demanding the money, or having any orders to do it. *Eyre*, Ch. J. held that the sale was made complete by the act of the plaintiffs; that by delivering the goods, without demanding the money, the property was vested in *Lacey* as upon a complete sale *ab initio*, without ready money. That was a much stronger case than the present.

Suppose the plaintiffs' note had never been presented; but that after a fortnight had elapsed, they had sent a bill of the goods, and the defendant had omitted to pay; could it be pretended that trover would lie? If so, the vendor has only to make his contract for cash; and may then pursue the property, whose hands soever it may reach, at any length of time, not barring an action upon the statute of limitations. The proposition is monstrous.

As to fraud, it seems to me, if there be any in the case, it is on the side of the plaintiffs. The judge admitted that the defendant acted under an erroneous opinion of his rights; and yet charged the jury that his conduct might be fraudulent. The fraud, I presume, was that of paying the plaintiffs with their own paper. If that be fraudulent, it must be admitted, that the defendant is guilty. But there is no evidence in the case, showing that he contemplated making such a payment, when he purchased the goods, or when he received them.

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CONYERS AND ANOTHER vs. WILLIAM ENNIS AND OTHERS, ADMINISTRATORS OF LEWIS ROUSMANIERE.

A BILL in equity which was set down by consent for a hearing upon the bill and answer. It was argued by *Hunter* for the plaintiff, and by *Randolph* for the respondents, upon the point stated in the opinion of the court.

STORY, J. This is a case of extreme hardship, and such as might well induce a court to strain after some mode of redress. The cause has come on upon the bill and answer, and the material facts are these: The intestate, *Lewis Rosmaniere*, a merchant of *Newport*, being deeply and fraudulently insolvent, on the 4th of *May*, 1820, wrote a letter to the plaintiffs, who are merchants in *Charleston, S. C.* and with whom he had previously done business, containing an order for the purchase and shipment of 30 casks of rice on his own account, from *Charleston* to *Newport*. On the 6th of *May*, the intestate, in consequence of the discovery of his frauds, committed suicide. The letter of the 4th of *May*, duly reached the plaintiffs, who, on the 16th of *May*, shipped the 30 casks of rice consigned to the intestate on his own account and risk, and drew a bill on the intestate for the amount, in \$500,73, payable at 30 days sight. The rice duly arrived at *Newport*, on the 24th of *May*, and was received and freight and charges paid by the defendants, who had previously taken administration on the estate of *Rousmaniere*, and represented it insolvent, according to the laws of *Rhode Island*. On the evening of the day in which the rice was received by the defendants, a letter arrived by the mail, from the plaintiffs, containing an invoice of the rice, and advising of the draft drawn for payment. Upon the presentment of the draft, the defendants refused payment, and it was duly protested. The rice was sold by the defendants, and the present bill is brought to obtain payment of the cost of the rice, out of the proceeds in the hands of the defendants. The defendants' answer admits, that at the time of the order, the intestate must have been insolvent, but that whether that fact was then known to him, they are unable to say; and it states, that the defendants are ignorant of any representations made by the intestate to the plaintiffs of his ability to comply with his engagements, and if he made any, whether he made them being himself deceived as to his pecuniary circumstances, or with a view to deceive the plaintiffs. It farther states, that the intestate to the day of his death, was actually engaged in business, and was in the daily receipt and payment of considerable sums of money.

The principal point, which, under these circumstances, has been pressed at the bar, is, that the right of a consignor to stop property in cases of insolvency, ought not to be confined to stoppage *in transitu*, but in equity should extend to all cases where the property is not paid for, and remains in the hands of the consignee. It is admitted, that the decisions in *England* have confined the right of stoppage to cases where the property is in its transit. But it is suggested, that the point has not been solemnly adjudged in the *United States*, and that it is open for the court to adopt the more enlarged rule, hinted at by Lord *Hardwicke*, in *Snee v. Prescott*, (1 *Atk.*

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contract, knowing that the other party acts upon the presumption that no such fact exists, is it not as much a fraud, as if the existence of such fact were expressly denied, or the reverse of it expressly stated?

Upon looking more attentively to the facts of this case, strong as at first blush they seem to be, I do not think they establish a case of meditated fraud. The intestate was in full business as a merchant, and there is no reason to suppose, that he did not expect still to keep on in business. It is admitted at the bar, that the accidental discovery of his fraudulent conduct led to the unhappy catastrophe which terminated his life, and he might have been able and have intended fairly to pay for the rice in question at the time when payment should become due. The sum was not so large as not to be completely within the ordinary means of a merchant. At all events, the bill does not pointedly put the case as one of meditated fraud and imposition; and so far as any conclusion to this effect might be drawn from the facts, it is repelled by the answer.

I do not say, that the *suppressio veri*, if made out in this case, would have sustained the plaintiffs' bill, even if it were a concealment of positive and deep insolvency, no device or contrivance having been made use of to deceive the plaintiffs. That is a question with which we need not at present intermeddle; and sufficient unto the day is the evil thereof. In the case now before the court, there is no pointed averment of such fraudulent concealment to cheat the plaintiffs; and if it had been averred, no attempt has been made to sustain it by proof; and without proof no court of justice ought to presume it, unless the presumption from the other facts, be direct and irrefragable.

Let the bill be dismissed with costs.

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MARY WOODBECK, an infant, by C. I. L. her guardian,  
against KELLER.

SLANDER, for accusing the plaintiff of perjury, tried at the *Montgomery* circuit, in *December*, 1825, before WILLIAMS, C. Judge.

In slander for charging the plaintiff with perjury; the defendant, in

order to justify by proving the truth of the charge, must give evidence of the same strength as would be necessary to convict of perjury on a criminal prosecution.

Accordingly, one witness alone is not sufficient to sustain the justification. His testimony must, at least, be corroborated by independent circumstances.

In neither case, is it precisely accurate, to say that the charge must be made out by two witnesses swearing positively, or by circumstances equivalent to a second witness. If there be only one witness, circumstances strongly corroborative, are enough; although not of themselves, and uncontradicted, sufficient to prove a fact.

In an action of slander, there were four witnesses against two as to one fact: and the judge charged the jury not to believe the two. On moving for a new trial, upon the ground that the judge should have left the evidence to the jury, *held*, that he should have done so; but as it was plain, from the case, that they ought to have come to that conclusion, a new trial should not, for that reason, be granted.

A notice of justification in slander should be proved with great particularity.

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perjury. There must be either two witnesses, or one witness corroborated by material and independent circumstances. Upon an indictment, the rule is well established and undisputed; (1 *Phil. Ev.* 112; 1 *Chit. L. C.* 563; 4 *Bl. Com.* 357; 2 *Str.* 1230; *Peak. Ev.* 9, 10;) and no ground of distinction is perceived, between the two cases. The defendant must affirmatively make out the fact of wilful and corrupt falsehood, as the public prosecutor must upon an indictment. And if, in the latter case, the oath of the defendant is to be considered equivalent to the oath of a witness, why should not a like effect be given to it in a civil prosecution? The general rules of evidence are the same in both cases; and no principle is perceived which requires the adoption of a different rule in this case.

It was asked upon the argument, whether two witnesses would be required, to justify a charge of treason? Unquestionably not. At common law, one witness was sufficient to convict of that offence. The statute of 1 *Ed.* 6, ch. 12, s. 22, was the first which required two witnesses to indict or convict of treason; and that statute, not having been enacted in *Ireland*, the common law rule was enforced, and convictions for treason were had upon the testimony of a single witness, after the passing of that act (1 *M'Nally*, 31. 1 *Chit. C. L.* 112, 13.)

The reason of the rule in cases of perjury, does not apply to treason. In the latter case, there is no oath against oath. The true reason, as remarked by Mr. *Peake*, in his *Treatise on Evidence*, (page 10,) which induced the legislature to require two witnesses in such cases, undoubtedly was, "a due regard to the lives and liberties of men, which, in heated and intemperate times, would be much more liable to danger, from pretended plots and conspiracies, if one witness was permitted to convict them of such offences."

There is no analogy, in point of principle, between the two cases.

It is not, perhaps, precisely accurate to say, that the circumstances required, in addition to the oath of a single

witness, in order to convict on an indictment for perjury, or to sustain a justification of that charge in an action of slander, *must be tantamount to another witness.* The same effect is to be given to the oath of the party, as though it were the oath of a disinterested witness. It is, therefore, witness against witness. The scale of evidence is poised; and the equilibrium must be destroyed, by material and independent circumstances, before the defendant can be convicted, or the justification sustained. But the circumstantial evidence need not be such as would, standing by itself, justify a conviction, or sustain a justification, in a case where the testimony of a single witness would be sufficient. It must be corroborative, and strongly corroborative of the testimony of the accusing witness. This is all that is required.

This rule is distinctly recognized by Mr. Phillips. He says, it does not appear to have been laid down that *two witnesses* are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite; *but at least one witness is not sufficient*; and in addition to his testimony, some other independent evidence ought to be adduced. (1 Phil. Ev. 113.)

Although this question was raised in *M'Kinley v. Rob*, (20 John. 351,) it was not adverted to in the opinion of the court, the case turning on other points.

The charge of the judge, therefore, in this case, upon the principle of evidence applicable to it, was substantially correct.

The justification was not sustained in relation to the pulling of the flax, and the number of bills paid to *Freeman*. The plaintiff's oath in relation to those points, was contradicted only by a single witness, uncorroborated by circumstances.

In relation to working in the oats, two witnesses, *Freeman* and *Magely*, testified that the plaintiff swore that *she had worked half a day for the witness, raking oats. That she commenced a little after dinner, and worked an hour or two after dark.* If she swore to this, the testimony is abundant to show that she swore falsely.

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But the judge charged the jury, that *Vrooman* and *Magely*, were contradicted by four witnesses, as to the evidence given by the plaintiff, in relation to working in the oats; and ought not therefore to be believed.

*John Cranker*, testified, that she swore, "*that she thought she had worked late enough, after it was time to quit, to make up half a day.*"

*James Pettit*, that she swore, "*that it was some time in the afternoon when she came to bind oats; and that she worked till late in the evening; and that she worked enough, after it was time to quit, to make up half a day.*"

*Cornelius Bennett*, "that she came to work at the oats, a little after noon; she went home for a rake; and she worked long enough, after it was time to quit, to make half a day."

*Henry Woodbeck*, "that she went to work a little after noon, and worked faithfully without going to tea, and thought she had worked a good half day."

Not one of these witnesses heard her swear that she had worked *an hour or two after dark*; but only that she thought she had worked enough *after it was time to quit, to make half a day; that she worked till late in the evening.*

This is essentially different from a positive oath, that *she worked one or two hours after dark.* As to the latter fact, she could not have been mistaken. *If it was not true, it was wilfully false.*

But according to the other witnesses, what she swore to, was expressed as an opinion, or in the vague terms of *late in the evening*; certainly leaving a much wider field for the belief of unintentional mistake or error, than in the other case.

The notice of justification states, that she swore in substance, and to the effect following: "That she had bound oats *half a day at one time for the said John S. Vrooman, under her father, some time in August, 1832.* That she had worked on that occasion, *an hour or two after dark, so as to make up half a day.*"

A justification must be proved with great particularity. (*Starkie on Slander, 179. 11 John. 38, and the cases there cited.*)



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396, *Garrantie de charters*. *Sir Henry Roll v. Sir Robert Osborn*, *Hob.* 20. *Hale's Anal.* 33. *Shep. Touch.* 182, 3, 4. *Co. Lit.* 389, a.)

Neither the right and title of the people, nor the eviction, are set forth in the declaration with sufficient certainty.

The plaintiff is only a tenant in common; and yet claims the whole damages as survivor. This is inadmissible.

*R. Manning*, contra. The warranty is a covenant. An action of covenant will lie upon every agreement under seal; and the covenantor is personally bound. This rule has been repeatedly applied to actions upon covenants of warranty in relation to lands; and that too without question. (*Wilby v. Mumford*, 5 *Coven's Rep.* 137, and the note to that case, at p. 143. 1 *Mass. Rep.* 464. 8 *id.* 162. 7 *John. Rep.* 258.) *Warrantia chartæ*, and voucher, are mere supplemental remedies; and the latter cannot be used by the grantee, except as tenant in a real action. Nor can he resort to the writ of *warrantia chartæ*, with a view to any other estate than the real. Both operate upon the real estate only of the grantor, leaving his person and his personal property untouched.

As to the breach, it is sufficient to show that a right existed in a stranger, before, and at the time of the grant, under which right we were evicted. It is not necessary to say that it is a right in fee. It is enough that it be for life. (2 *Saund.* 181 a, note (10).) It is not necessary to show what the title is. That may be impossible; for the claim is by a stranger. Nor is it necessary to aver an eviction by process of law; nor show by what agents the eviction was effected. (1 *T. R.* 671.)

The eviction took place when all parties were alive; since which one of the grantees has died. By the breach, the right to damages became a chose in action; (2 *John.* 1;) and survived. The action is, therefore, properly brought in the name of the survivor. The covenant being

personal as well as real, the action was properly brought against the executors. (1 *Chil. Pl.* 37. 3 *Wils.* 29. *Cro. Eliz.* 553. *Com. Dig. Covenant*, (C. 1.) 2 *John. Rep.* 1.)

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Jay, in reply. The question whether the covenant was real or personal, was not raised in the cases cited from 5 *Coven.* No doubt the warranty is a covenant; but the question is, for what purpose? Not for a personal purpose. The words *dedi et concessi* sometimes imply a covenant of warranty; yet a personal action will not lie. (*Soper v. Morgan*, 1 *Keb.* 821.) And the rule holds mutually. The heir alone can bring the action; and it should have been brought in his name. He may have *warrantia chartæ*; but he cannot bring a personal action of covenant. This is the ground of our objection that the action cannot be maintained by the surviving tenant. The right is real property, not personal. The action must be brought by the heir of the deceased grantee, against the heir of the deceased grantor. The recovery is of land.

There is, perhaps, no ground for our objection that the action is brought by the surviving grantee, if the claim be, in truth, a personal one, which would pass to an executor on one side; and can be enforced against him on the other.

Nor do I, upon this general demurrer, feel any great confidence in the objection to the manner of setting forth the title of, and eviction by the people.

*Curia, per* WOODWORTH, J. It is contended that the action cannot be sustained upon the warranty; it being a covenant real, and not binding on the personal representatives of the testator.

I am not aware that this question has been expressly decided in our courts. Actions have been sustained on the covenant of warranty; but this point seems not to have been raised, or noticed by the court or counsel. The causes were disposed of on other grounds.

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Thus, in *Kent v. Welch*, (7 John. 258,) the plaintiff declared on a deed, whereby the defendant gave, granted, bargained and sold a tract of land; and engaged to warrant and defend; it was held that no action could be maintained, either on the implied or express covenant, without alleging and proving an eviction; and that the express warranty qualified and restrained any implied covenant of seisin, arising from the word *give*. From this case, it may be inferred, that the form of action was not considered objectionable; or it would have been suggested, inasmuch as the evidence there required, would, under any form of pleading, have been unavailing, if the objection now taken is well founded. So also in *Wühy v. Mumford*, (5 Cowen, 137,) the action was covenant for breach of a warranty. The defendant demurred, on the ground that his grantee conveyed to the plaintiff with warranty. It seems to have been taken for granted, that a personal action was sustainable; for the point was not even discussed.

As this is a fit occasion, I will briefly state my views on the question.

At common law, a warranty was the foundation of a voucher, by the tenant, when impleaded; and if he lost the land, he might have judgment to recover of the warrantor other lands to the value. It is of feudal origin. According to 2 *Bl. Com.* 301, warranties were introduced in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. *Bulwer*, in his note 315 to *Co. Lit.* 365, *a.*, observes of the doctrine of warranty, that "the effect and operation of warranties having, by repeated acts of the legislature, been reduced to a very narrow compass, it is become, in most respects a matter of speculation, rather than of use." The use of this covenant is superseded by the introduction of other personal covenants. In many, if not in most cases, there is no occasion for resorting to the covenant of warranty. In some, however, it is the only express covenant inserted. With us the remedy by *warrantia chartæ*, or voucher, may be considered obsolete. No case of the kind has

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tion of covenant broken, on a real covenant of warranty." 1 *Brownl.* 21, and 2 *Brownl.* 164, 165, are cited. (a) The same doctrine is laid down in *Marston v. Hobbs*, (2 *Mass. Rep.* 438.) If this position be correct, then even according to the English law, this action may be maintained; the grantees having been expelled by lawful right and title.

It follows that if the covenant is personal, the representatives are liable; and the grant being to two, who were evicted in their life time, the action is well brought by the survivor.

Judgment must be rendered for the plaintiff; with leave to the defendants to amend.

Judgment for the plaintiff.

(a) *Waters v. The Dean and Chapter of Norwich*, 9 & 10 *Jac.* in a personal action of covenant; on a covenant in a lease by the defendants to the plaintiff for three lives. The covenant was to *acquit and save the lessee harmless*, during the term, against any previous lease by the lessors, or their predecessors. (Vid. 2 *Brownlow*, 158.) The main question was, whether the covenant was binding, the lease being voidable; and held that it was; and judgment for the plaintiff.

BELL and others *against* PALMER and HAMILTON.

A consignee, or factor, making advances on the goods of his consign- or, or principal, to an amount even beyond their value, is yet bound to obey the instructions of the latter as to the time of sale, tho' there be no agreement to that effect. And if, being instructed to sell immediately, he refuse the first offer, in expectation of a more favorable market; and afterwards sell at less than the offer; he is liable, though he act in perfect good faith.

ASSUMPSIT, tried at the *New York* circuit, *December* 3, 1823, before EDWARDS, C. Judge, when the following facts appeared:

The defendants, at *New-York*, having on hand a quantity of cocoa consigned to them by *D'Arcy* and *Dedier*, of *Baltimore*, at the request of *Darby*, one of the plaintiffs, consigned to their house of trade at *Leghorn (Italy)* a part of this cocoa in two parcels on an advance by the plaintiffs of £2100, sterling; the defendants agreeing to be personally liable for the advance. The consignment to the plaintiffs was by the ship *Minerva Smith*, which ar-

rived at *Leghorn*, *September* 1, 1819. The consignment was accompanied with the defendants' letter of instructions as to the principal parcel, dated the 23d of *June* previous, in which they said, "we enclose invoice and bill of lading for 910 bags of *Guayaquil* cocon, of a very superior quality; amounting per invoice to \$13,660. It is our wish that an immediate sale be made of this shipment on its arrival; and Mr. *Darby* gives us assurances of a favorable result, judging from quotations of the article at your port." A subsequent letter as to the smaller parcel referred to the former letter for instructions. The article was ready for sale at *Leghorn* on the 20th of *September*. Between that day and the 28th of the same month, the plaintiffs had an offer of 12 $\frac{3}{4}$ pesos per cwt. which they declined, on the ground that it would not cover anticipations, freight, insurance and charges; and was finally not sold, till *June*, 1820, at \$11, per cwt. In the mean time, they had made various attempts to sell at a greater advantage. On the 9th of *August*, 1820, the plaintiffs sent to the defendants their account of sales and account current, showing a balance in their favor of \$2565.52, for which this action was brought. The defendants refused to pay that sum; but on the 1st of *April*, 1822, they paid the plaintiffs \$600.26, which would be 20 cents more than the balance due the plaintiffs, if they had taken the offer of 12 $\frac{3}{4}$ pesos.

Evidence was given at the trial upon the question whether the plaintiffs had conformed to the spirit of their instructions; and whether the defendants had acquiesced in their proceedings. But it is not necessary to state this; as the case here turned on the charge of the judge upon the effect of the instructions.

In his charge, he stated the rule of law to be, that (unless a special agreement exists) consignors, by receiving an advance upon property shipped, subject it to the power of the consignees, and part with their right to control the disposition of it; so far as to enable the consignees to hold it a reasonable time to consult the market, and to adopt

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such reasonable measures, as may be necessary to enable them to reimburse themselves. The letter of instructions he considered immaterial; for if there was no special agreement, the instructions could be of no avail against the lien of the plaintiffs.

The jury finding difficulty on the question of the agreement, the judge further charged them, that in order to hold the plaintiffs liable, they ought to find, that there was an express agreement, that the goods should be sold immediately on their arrival. That if there was not an agreement to that effect, the letters of instruction were of no importance; and ought to be laid out of the question; and that it lay with the defendants to establish the agreement.

The jury found for the plaintiffs \$2514,02.

J. Duer, now moved for a new trial, on this ground, (among others :) that the plaintiffs were bound by the defendants' instructions, to sell the cocoa immediately on its arrival; and the judge erred in charging the jury that the letters of instruction were of no importance, and that there must have been an express agreement. (1 *John. Cas.* 436, 437, 462 to 467, *note.* 4 *John. Rep.* 103. 13 *id.* 332.) He agreed that the plaintiffs had acted in good faith; but this was not enough. They should have accepted the first offer of 12 $\frac{3}{4}$ pesos per cwt. He denied that there was any authority for requiring a special agreement; and insisted that the right and duty of the consignees were not varied by the advance. True, he said, the consignee has a lien, in such a case; but he has no right to sell in virtue of his lien merely. Before that can be done, the pledgor must be formally called on to redeem.

The instructions in this case are sufficiently explicit. A request by one having a right to command, is always construed imperatively. No discretion was allowed; and the parties must have so understood the letter.

It was a condition that we should not be liable unless there was an immediate sale. This should have been strictly per-

formed. Where one is under an obligation to sell, if he lets an opportunity to sell to advantage pass, and afterwards sells at a less advantage, he must abide the loss. (*Curry v. Edensor*, 3 T. R. 524.)

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P. W. Radcliff and *T. A. Emmet*, contra. The letters of the defendants do not import an absolute order to sell immediately, and, at all events, whatever might be the state of the market. They must be understood as meaning a sale which should not be injurious to the consignor. If otherwise, the order was not obligatory. It was not competent for the defendants, after receiving an advance on the credit of the cocoa, to compel a sale which would not cover advances and charges, unless there was a special agreement at the time, authorizing such an order. Otherwise the consignor may defeat the object of the consignment, which is security for the advance. Whether there was such an agreement, is a question of fact; and was properly put to the jury.

It is conceded that we acted in good faith. This was sufficient under the circumstances. (3 *Coven*, 281.) We were not bound literally to follow instructions, at whatever sacrifice. (1 *John. Cas.* 174. 3 *id.* 311. 4 *Bin.* 361. 1 *Yeates*, 486. *id.* 409. 1 *Liv. on Agency*, 369.) If we had sold, and the market had afterwards risen, the case would have been stronger against us.

The lien gives a right to hold the goods, if not to sell them. There was no need of calling on the defendants to redeem. There was authority to sell, though not positive and effectual instructions to sell immediately.

All we contend for is, that the consignee should have a reasonable time to look to the market.

This is not the case of a will, in which we admit that the mere expression of a wish is to be construed imperatively.

But when one parts with an interest in property, he parts *pro tanto* with the control of it. He cannot diminish its value by hastening the sale, whether it be the sole

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security, or not. He can no more do this than a mortgagor of real estate, who is always bound personally.

The counsel also cited 2 *Gall.* 13.

J. O. Hoffman, in reply. The judge finally excluded from the jury every thing except the question whether there was an express agreement. He did not even leave room for them to find an implied agreement. No authority has been, or can be cited, showing the necessity of any agreement, to secure the control of the consignors.

The lien was merely on the *proceeds* of the goods; not on the *goods* themselves. These were to be sold; and so both parties understood. The instructions of the principal must be obeyed. The plaintiffs were the mere agents or factors of the defendants. And the lien for advances was never held to give the factor a control beyond what he would otherwise have. The principal may order a sale when he pleases; and require his factor to rely on his personal security for the balance of the advance, if it exceeds the amount of sales. The consignee always agrees to this. It is implied from the nature of the transaction.

In good sense, these instructions were to sell at the market price on the first offer.

Curia, per SAVAGE, Ch. J. There is no dispute but the advance on the goods exceeded their value; and the defendants admit their liability to refund the difference between the money loaned, and the value of the cocoa at 12 $\frac{1}{2}$ pesos. But they contend that the plaintiffs, not having taken that price when offered, and having subsequently sold for eleven, must bear the loss. Whether the plaintiffs were bound to have taken that offer, and to have sold immediately on the arrival of the cocoa; or whether they were justified in holding it longer, to try the market, is the only question.

The judge at the trial charged the jury, that the letters of instruction were to be laid out of the question, unless there was an express agreement to sell immediately. In

this I apprehend there was an error. The plaintiffs, by their representative, *Darby*, had refused to purchase, but solicited the consignment of the cocoa. They received it as factors; and of course under the rights and duties which exist by law between principal and agent. The plaintiffs having advanced money upon the goods, gave them a lien for the amount of their advance; but I do not find any authority for saying that the lien thus created alters the rights of the parties in any respect, so far as relates to the duty of the factor in making sale of the goods. Nor is there any reason why it should. The principals are liable for the money advanced; and the goods being at their risk, are subject to their order and control, in every respect not inconsistent with the lien of the factor.

The factor's lien is upon the goods, and upon the proceeds. (*Cowp.* 256.) The most advantageous sale should be made; that the balance, if in favor of the principal, may be as large as possible; and, if against him, as small as possible. It is the duty of the factor to manage the affairs of his principal in the same manner, and with that care and diligence, which a prudent and discreet merchant would exercise in relation to his own affairs. But he must still obey his instructions; because it is the principal who bears the loss. The factor must, for that reason, be liable for negligence or for departure from instructions in the same manner as in ordinary consignments.

It was said by this court, in *Rundell v. Moore*, (3 *John. Cas.* 37,) that agents or factors who disobey their instructions through mistake or design, are undoubtedly responsible. In *Evans v. Potter*, (2 *Gall.* 13,) *Story*, justice, says, "a factor is bound to ordinary diligence in relation to the property confided to him. Where the orders leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct." "If he can advantageously sell the property, and neglect so to do, he must answer in damages. But if the markets are low, or unusually crowded, if new and unexpected difficulties arise, he is not obliged to sell at all events, and under every disadvantage." The same doctrine of

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the liability of the factor for ordinary negligence, is found in the treatises on agency, by *Paley* and *Livermore*, and cases cited by them. (*See also* 1 *John. Cas.* 178, 9.) But the consignee must obey his instructions. If he sell under the given price, though from good motives, he is bound to make good the loss. (*Guy v. Oakley*, 13 *John.* 333, 4.)

If the principal give orders to his factor, they must be pursued, or he becomes liable. If none are given, or they are not clear and explicit, the factor is allowed to use his best discretion according to the usage of trade. (*Geyer v. Decker*, 1 *Yeates*, 487.) This case was cited to show that orders to sell *on arrival*, were complied with, if a sale was made within six months. But the time was not made a point in the cause. The breach, it was contended consisted in selling on credit, when the orders were for cash; the language being to sell on arrival, and remit the produce by the same vessel, or any other vessel, to *Philadelphia*, in bank notes. The court held that was no direction to sell for cash only. They also say, there was strong proof of acquiescence.

The case of *Dusar v. Perit*, (4 *Bin.* 361,) maintains the proposition, that a departure from instructions, may be excused by an event not contemplated at the time the instructions were given. The supercargo, in that case, was compelled to go to the *Havanna* to repair his vessel, in consequence of an accident. He sold the vessel and part of the flour, at the limited price. The residue of the flour was sold at less than the price fixed by his instructions, in consequence of the arrival of other cargoes. The general principle, of the liability of agents in case of deviation from instructions, is not at all impugned by this case. *Yeates*, justice, says, "I think it a matter of great moment in commercial transactions, that agents should be strictly held to execute the orders of their principals; but I do not think this such a case as demands the court's interposition in order to guard that principle."

In none of the cases cited, nor in any which I can find, is the distinction taken which was relied on by the judge;

to wit, that in cases where advances are made on goods consigned, the consignee is not bound to obey the instructions of the consignor.

The analogy between consignor and consignee, and mortgagor and mortgagee, does not strike me as very forcible, except it be that the mortgagee, in the act of foreclosing his mortgage by sale, resembles the consignee in selling goods upon which he has made advances. In such case, should the mortgagee refuse a higher price, and afterwards take less, ought he not to account to the mortgagor for the highest price offered?

I do not wish, however, to be understood as now expressing an opinion upon what I conceive to be the question hereafter to be tried, to wit: whether the plaintiffs were guilty of negligence by disregarding their instructions. This is a question of fact, which should have been submitted to the jury.

A new trial must be granted; the costs to abide the event.

New trial granted.

JACKSON, *ex dem.* LOOP AND OTHERS, against HARRINGTON. (a)

EJECTMENT for part of military lot No. 43, in *Sempronius*, in the county of *Cayuga*, tried at the circuit in that county, *September 8th*, 1824, before **THROOP**, C. Judge.

At the trial, the plaintiff proved the patent of the lot to **Schreider** the soldier, dated *July 8th*, 1790; and a conveyance of all his expected military bounty land from him to

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209,) neither of which were deposited in the clerk's office of *Albany*, pursuant to that act; *held*, that the deed last executed took preference.

Held also, that a conveyance by the patentee for a valuable consideration, subsequent to the second, should take preference of that; but, it appearing that it was executed pending an ejectment by those claiming under the second conveyance, to a grantee who had notice of that conveyance, and actual knowledge of the first; *held*, that it lay with the defendant to show, otherwise than by the last conveyance, that a valuable consideration was in fact paid.

Whether a subsequent conveyance for valuable consideration, with notice of a prior deed, comes within the protection of the statute, (1 R. L. 209,) or it must be *bona fide* in the full sense of the terms? *Quære*.

(a) This case was decided in *February* term, 1826.

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C. Loop, the deceased father of the lessors of the plaintiff, and under whom they claimed as heirs, dated in the spring or summer of 1784. It appeared that this deed was lost, or destroyed by accident, in 1796 or '7; and was, therefore, never delivered to, or deposited with the clerk of the city and county of *Albany*, according to the statute, (1 *R. L.* 209.)

The defendant produced and proved a conveyance from *Schreider* to *F. Carbine*, now deceased, dated *August 7th*, 1783, of all his (*S.'s*) expected military bounty lands. This conveyance had never been filed according to the statute; but was recorded in the clerk's office in the county of *Cayuga*, *September 7th*, 1824. It was proved that the defendant held as a tenant under the *Carbine* title.

This suit was commenced in *May* term, 1823; and it farther appeared at the trial, that after it was so commenced, *Schreider*, the soldier, conveyed the whole lot to *E. Z. Carbine*, a grand-child of *F. Carbine*, and one of the heirs of the old title to *F. Carbine*. This deed was dated *September 29*, 1823; and purported to be for the consideration of \$3000; and was acknowledged and recorded on the *9th* day of *October*, 1823. *E. Z. Carbine* made this purchase with notice of the claim by the lessors of the plaintiff, and of the title under which they claimed.

Verdict for the defendant, with leave to move for a new trial.

J. A. Collier, for the plaintiff. Neither conveyance having been deposited, the question is, which shall be preferred. The act, (1 *R. L.* 209,) does not declare that a deed not deposited shall be deemed void, except as to subsequent purchasers. The act means the last purchaser prior to the *8th* of *January*, 1794.

If there be several conveyances, and none filed, the last is to be preferred. *Jackson v. Hubbard*, (1 *Caines*, 82,) amounts to this. Though the subsequent deed was recorded in that case, such a circumstance can make no difference. It was good without being filed or recorded, as to all former deeds not filed. (19 *John*. 281.)

E. Z. Carbine was not a *bona fide* purchaser; but took with full notice. Beside, the conveyance was for land in suit, and the sale therefore void.

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*D. Kellogg*, contra. Neither deed being filed, the question remains as at common law; and the *Carbine* deed being oldest, takes preference.

It is no objection to the deed of *September, 1823*, that the grantee, *E. Z. Carbine*, had notice. The object of the statute in question is more than the common registry acts. The deeds are required to be deposited; in order to enable subsequent grantees to detect forgeries. If such grantees have paid a valuable consideration, it is enough, whether they have notice or not. And so are the words of the act.

*Curia, per SAVAGE*, Ch. Justice. Were this question to be determined by the common law, undoubtedly the first deed would be operative, and the second void. But the legislature on the 8th of *January, 1794*, (1 R. L. 209.) passed "an act for registering deeds and conveyances relating to the military bounty lands;" reciting that many frauds had been committed respecting the titles to those lands, by forging and antedating conveyances; and by conveying to different persons, and by various other contrivances, so that it had become very difficult to discover in whom the legal title to some of the lands was vested. For remedy whereof, and in order to detect these frauds, and to prevent the like frauds in future, it was enacted, that all deeds and conveyances theretofore made and executed, or pretended so to be, of such lands, should be deposited with the clerk of the city and county of *Albany*, on or before the 1st day of *May, 1794*; and that all deeds and conveyances of military bounty lands, "which shall not be delivered to, and deposited with the said clerk, on or before the said 1st day of *May* aforesaid, shall be adjudged fraudulent and void against the subsequent purchaser or mortgagee for valuable consideration." By an act of the 27th of *March, 1794*, (1 R. L. 211,) the time

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of depositing such deeds was extended to *May 1st, 1795*. These deeds were to be kept in bundles alphabetically; and a register made of the names of the parties, for the purpose of inspection. They were, after a certain time, to be delivered to the clerk of the county in which the lands lay, there to remain for the benefit of all persons interested. It was also enacted that all conveyances, to be executed after the *8th of January, 1794*, should be recorded; and that the deed first recorded should be operative. These deeds were to be acknowledged or proved. Not so of those executed prior to the passing of the act. It is contended for the plaintiff, that every deed is to be tested by the statute; and if not deposited as the statute directs, is fraudulent and void against the subsequent purchaser; and, of course, the deed of *Carbine*, dated in 1783, not being deposited, must be adjudged fraudulent and void as against the *Loop* deed executed in 1784.

Each of the deeds is valid as between the parties; and as to all the world, except subsequent purchasers or mortgagees. It follows that the deed of 1783 is void as to the deed of 1784; and that would also be void as to a subsequent one, had there been such an one before the passing of the act of the *8th of January, 1794*.

The argument on the other side is, that both being *in pari delictu*, the question is left as at common law, and the elder title must prevail.

Jackson v. Hubbard, (1 *Caines' Rep.* 82,) was cited by the counsel for the plaintiff. In that case, the patentee of a military lot sold it in 1783. The deed was recorded in the secretary's office; but was not deposited in the clerk's office according to the statute. On the *1st of October, 1788*, the patentee executed a power of attorney, by virtue of which, the lot was conveyed by the attorney the *14th of August, 1795*, and the deed was duly recorded in *Onondaga* county. The court decided, that though the first deed was recorded, yet that did not satisfy the act; as the object was declared to be the prevention of frauds

by facilitating the means of discovering forgeries. And the junior title prevailed. In that case, the power of attorney under which the junior deed was executed, was not deposited, though executed prior to passing the act. Possibly the court considered simply the execution of the deed, which was after the time limited for depositing deeds; and gave it the same efficacy as if executed at its date by the patentee himself, laying out of view the date of the power of attorney. If this was so, the case is not an authority for preferring the last of two deeds executed before the act, and not deposited; though if it was considered material that the power should be deposited, the authority of that case is in favor of the junior title in this.

But independent of authority, it seems impossible to sustain the elder deed here consistently with the statute; and if no further facts appeared, the plaintiff would be entitled to recover.

On the trial, the defendant produced a deed from the patentee to *E. Z. Carbine* for the whole lot, purporting to be in consideration of \$3000, dated the 29th of September, 1823, and recorded the 9th of October, 1823; after this cause had been noticed once for trial, and the grantee had notice of the suit, and of the title under which the lessors claim.

According to the construction which I have given to the act, and according to the case of *Jackson v. Hubbard, E. Z. Carbine* must hold in preference to either of the deeds of 1783 and 1784, provided he can be considered, in the language of the act, a *subsequent purchaser for valuable consideration*. He certainly knew that he was purchasing what he before claimed under the deed of 1783, and he knew also that he was purchasing a disputed title. The act of purchasing in 1823, the same lot which his grandfather purchased in 1783, forty years previous, was an admission that he did not choose to rely on the old deed. Clearly he was not a *bona fide purchaser*, within the full meaning of the phrase; for he had notice.

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Is *E. Z. Carbine*, then, to be considered a purchaser for a valuable consideration, supposing this to be sufficient? Had we heard nothing of this purchase but what appears on the face of the deed, we should be bound to receive it as *prima facie* evidence of a valuable consideration. The circumstances are, however, peculiar; and I think call for further proof that a valuable consideration was paid. The soldier had notoriously given conveyances valid as to himself in two successive instances; one of these was well known to *E. Z. Carbine* when he purchased; and of the other he had notice; and, at least, must have entertained a strong suspicion. Is it natural, that dealing with the soldier under such circumstances, he should neither exact, nor *Carbine* pay him a valuable consideration? Is it not probable that the consideration was merely nominal, paid to and received by the soldier, not as the value or price of the land; but colorably, and in fraud of the suit then pending? Without saying whether the deed was void as being for a thing in action, we think the circumstances of the case required proof by witnesses, or in some way independent of the deed, that a valuable consideration was in fact paid.

A new trial must therefore be granted.

New trial granted.



JACKSON, *ex dem.* SPRAGUE and OTHERS, against  
BOWEN. (a)

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Bowen.

EJECTMENT for a part of lot No. 5, in *Lysander*, tried at the *Oswego* circuit, in *December*, 1824, before THROOP, C. Judge.

At the trial, the plaintiff insisted that the defendant had entered upon the premises in question, under a contract to purchase them of the lessors of the plaintiff. A contract of purchase was accordingly given in evidence; but the testimony was conflicting upon the question whether the defendant in fact entered under it; he insisting that he entered and held possession under a contract with one *Camp*, whose claim was adverse to that of the lessors.

The plaintiff then went to his title, and proved letters patent for lot No. 5 to *Godfrey Byerd*, a soldier, for revolutionary services, which passed the secretary's office *August 7th*, 1790. He then proved a conveyance of the lot in fee from *Byerd* to *Reuben Murray*, dated *June 9th*, 1792, which was duly deposited in the *Albany* clerk's office according to the acts of *January 8th* and *March 27th*, 1794. (1 R. L. 209, 11.) From *Murray* he deduced title in fee to the lessors of the plaintiff.

The defence was a deed from the soldier to *Edward Cumpston*, dated the *5th* of *November*, 1783. This deed conveyed all the soldier's expected bounty lands in fee to *Cumpston*, with a power of attorney to *Jeremiah Van Rensselaer* and *Abraham Ten Eyck*, to convey to *Cumpston* in fee, and a covenant that when a patent should issue for the soldier's lands, they (his attorneys) should convey them in fee simple to *Cumpston*. The defendant then proved a deed executed by the attorneys, reciting the power, and dated the *23d* of *September*, 1790, from the soldier to *Cumpston* in fee. This deed, executed by the attorneys, was deposited pursuant to the statutes before cited; but the deed constituting them attorneys, was not.

To render the conveyance of a military lot, executed before *January 8th*, 1794, valid as against a subsequent purchaser; not only the immediate deed must have been deposited, pursuant to the act of 1794, (1 R. L. 209, §11,) but also the power of attorney under which it was executed.

(a) This cause was decided at *May* term, 1826.

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The defendant claimed under the *Cumpston* title; showing several intermediate conveyances of title from him to one *Leffingwell*, with whom *Camp* contracted to purchase; and under whom the defendant, as before mentioned, claimed to have taken possession.

The judge directed the jury to find for the plaintiff, if they believed that the defendant took possession under the lessors; but if they believed that he took possession under *Camp*, and found the deed to *Cumpston* to be genuine, they should then bring in their verdict for the defendant; it not being necessary that the deed containing the power should be deposited.

Verdict for the defendant.

A case was made; and it was agreed, that it might be turned by either party into a special verdict; and that if this court should be of opinion that the deed to *Cumpston* containing the power, was void as to the deed of *June 9th*, 1792, by reason of not being deposited, that then the judgment should be for the plaintiff.

But if the court should be with the plaintiff on any other ground, a new trial to be granted.

If they should be with the defendant on all the grounds, then judgment to be entered for the defendant.

*J. Platt*, for the plaintiff. The deed from the soldier, containing the power of attorney, not having been deposited, was void; and all the title derived from it was inoperative as against the lessors of the plaintiff, who claimed under a subsequent deed from the soldier.

If notice only had been designed by the statute, (1 *R. L.* 209,) a mere registry would have been enough. The legislature had a further object. That was to detect frauds; and they required the original instrument to be deposited with that view. The mischief could not be reached without this being done. Indeed the detection of frauds was the declared object of the statute.

The deed from the attorneys was an act of supererogation. The whole title depends on the original deed to *Cumpston*. It passed the estate under the statute, (*sess.* 13, *ch.* 59, *s.* 5, 2 *Greenleaf*, 333.) That act was rem-

edial, and should be construed liberally. The original deed, then, is not to be regarded as a mere power of attorney; but as a conveyance in itself. It became valid, as such, by the act last cited; and when the act of 1794 passed, requiring the deposit of military deeds, it extended to the deed containing the power. In this view, *Jackson v. Neely* (10 John. 374,) on which the circuit judge relied, does not dispose of the question. That was the case of a naked power. But how stands the authority of that case? *Jackson v. Hubbard*, (1 Caines, 82,) is directly opposite in principle. The former regards the statute as a mere registering act; the latter declares its object to be the detection of frauds and forgeries. *Jackson v. Hubbard*, was entirely overlooked in *Jackson v. Neely*; although the former was much more fully considered. Even a naked power is plainly within the spirit and intention of the statute. It is a matter which affects the title; and any paper having this effect must be deposited. *Jackson v. Neely* was virtually overruled by the court of errors in *Wendell v. Wadsworth*, (20 John. 659.)

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A. Van Vechten, contra. The original deed to *Cumpton*, not being able to reach the soldier's land by any definite description, provided for this defect, by a power to convey when the patent to the grantor should be executed. The defendant's claim is, therefore, under the subsequent deed, given in virtue of the power. Whether the first deed passed the title or not, there is nothing to prevent the soldier giving a second; and both are prior to the deed under which the plaintiff claims; so that the only question on the merits is, whether the power should have been deposited. A power of attorney is no part of the conveyance; but a mere authority to convey. One object of the legislature must have been notice. The deed of 1790 contains all that is necessary, to enable the party to look into the power of attorney. The power and all the particulars are recited; and names are given. *Jackson v. Neely* is full to this point. *Wendell v. Wadsworth* did not mean to overrule *Jackson v. Neely*. So

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far from it, this case is not mentioned in *Wendell v. Wadsworth*.

Curia, per SAVAGE, Ch. Justice. The doctrine that, he who enters under the title of the lessor of the plaintiff, cannot afterwards dispute it, is not controverted in this case; but the fact is denied, that the defendant did so enter. The jury, by their verdict have found that the defendant entered under *Camp*. On that fact, the evidence was contradictory, and the verdict should not be disturbed in this respect.

The important question is, whether the power of attorney from *Byerd* to *Van Rensselaer* and *Ten Eyck* should have been deposited.

The object of the legislature, in passing the depositing acts, of 1794, as declared in the preamble to the act of *January 8th*, 1794, was, to afford every possible facility to the detection of forgeries. It was notorious, that many spurious deeds were in circulation, purporting to convey those lands, which were then becoming valuable; and had been, since the revolutionary war, the subject of much speculation. To prevent litigation, and to enable claimants not only to know what elder titles were in existence, but to ascertain their genuineness by actual inspection, were the objects of the act. If I am right in this, it would seem to follow, that a deposit of a deed, executed by power of attorney, without the power of attorney itself, would be insufficient. One object was, to ascertain the genuineness of the signature of the soldier. How is that accomplished by depositing his signature avowedly written by another? As a conveyance, the deed of 1783, is clearly void for not being deposited; and if, as a power of attorney, it need not be deposited, the object of the legislature is frustrated. A deed executed under a forged power of attorney, gave as much notice of the claim, as if the power of attorney had been genuine; and depositing such a deed has the same effect as if supported by a true power. This construction of the act may be consistent with the idea, that the intention was

merely to give notice ; but totally repugnant to the declared object, which was to detect frauds and forgeries.

When this court was first called upon to give a construction to the depositing acts, in *Jackson v. Hubbard*, (1 *Caines' Rep.* 82,) it was expressly declared, that the object of the acts was the prevention of frauds, by facilitating the means of discovering forgeries. And it was then decided, that though a deed was recorded in the secretary's office, and the clerk's office, in *Onondaga* county, if not deposited according to the acts of 1794, it was void and inoperative against a subsequent purchaser. It was remarked, that the examination of a mere record, could not answer the object of the act ; and yet an inspection of a record is quite as useful to ascertain the genuineness of the original, as the examination of a deed by an attorney, to ascertain the genuineness of his power, when that power is not produced. The court there say, "nothing short of an inspection would, in many cases, answer the purpose;" and it might with equal propriety have been said, in *all cases*, nothing but actual inspection would answer.

The next case is *Jackson v. Neely*, (10 *John.* 374,) where this precise question came before the court. They say, however, it is unnecessary to decide, whether the power should have been deposited ; "for admitting it to have been requisite to deposit the letter of attorney with the conveyance ; yet, as the conveyance was duly deposited, and as it recited the letter of attorney by virtue of which the conveyance was made, the subsequent purchaser had notice of the power by means of the recital, and is affected equally, as if the power itself had been deposited." This decision was made in *October*, 1813. The case of *Jackson v. Hubbard*, decided in *May*, 1803, was not referred to by either the counsel or the court ; and it is manifest that the two cases are at variance with each other ; the one proceeding on the principle that the object of the deposit was to detect frauds and forgeries ; the other, that it was merely to give notice, which a record or registry would have done as well. That the latter was the princi-

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ple upon which the court acted in *Jackson v. Neely*, is manifest from what is said by chancellor *Kent*, in *Wadsworth v. Wendell*, (5 *John. Ch. Rep.* 229.) He presided in this court, when *Jackson v. Neely* was decided; and acting upon the same principle in *Wadsworth v. Wendell*, he says, "the deposit of these conveyances was intended by the legislature to be notice to all subsequent purchasers, of their existence and contents; and the deposit of them would have been in a degree useless, if it was not intended to operate as notice." He adds, that the deposit was a substitute for registry, and equivalent to recording. This doctrine was overruled by the unanimous opinion of the court for the correction of errors in the same case, when carried up on appeal. *Spencer*, Ch. J. who delivered the only opinion, says, "the construction put upon this statute by the chancellor, is such as was never anticipated by the profession, nor imagined by the legislature; and with the utmost deference, I must say, that in my judgment, it cannot be supported." He subsequently adds, "when, therefore, the legislature required these unauthenticated, unacknowledged, unproved and unrecorded deeds, to be deposited by a fixed day; and declared that if they were not thus deposited, they should be adjudged fraudulent and void against subsequent purchasers for valuable consideration, they could not have intended to give greater effect to them, than they had before," &c. or to require subsequent purchasers to take notice of them.

This case is no otherwise applicable here, than as it decides expressly, that the object of the legislature was not to make the deposit a notice to subsequent purchasers; but merely to enable those interested, to prevent frauds and detect forgeries.

Such being the object, as declared by the legislature, and adjudicated by our highest court, the case of *Jackson v. Neely* is virtually overruled.

The object of the depositing acts, then, being an inspection of the original deeds and signatures, of those who had drawn these lands, and of whose signatures it was alleged there were many forgeries, the depositing of the

deed executed by attorney, was not a compliance with the act. The power of attorney being void by force of the acts of 1794, the deed founded upon it falls ; and with it, all pretence of title in the defendant, or out of the lessors. They are, therefore, entitled to judgment.

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Judgment for the plaintiff.

V. DICKENSON *against* JACKSON, *ex dem.* CALDWELL. (a)

ON error from the *Warren* common pleas. The action in the court below was ejectment on the demise of *Caldwell* against *Dickenson* ; tried in the court below at its *January* term, 1823. The declaration was returnable at its *May* term, 1821. It contained but one count, and one demise, which was laid on the 8th of *September*, 1817.

At the trial, the plaintiff below claimed to recover the premises in question under a mortgage of them, dated the 8th of *September*, 1817, (the day of the demise,) executed by one *G. Dickenson*, to the lessor of the plaintiff. *G. Dickenson*, before the commencement of the ejectment, conveyed the premises in question to the defendant below by deed, in fee simple absolute, without any allusion to the mortgage. This deed was dated *July 5th*, 1819 ; and on the same day, the defendant below entered and took possession under the deed.

The amount secured by the mortgage was \$400, payable on or before the 8th of *September*, 1821, with interest on the 8th day of *September* in each and every intervening year. One year's interest, and no more, had been paid by *G. Dickenson* ; and none of the principal, when the suit was commenced.

The above facts were mutually admitted on the trial.


The defendant below objected to the plaintiff's recovery, and moved for a nonsuit, on the ground that he had shown neither a right of entry in himself, nor possession of the defendant below, on the day of the demise laid in the declaration ; nor any notice to quit.

(a) This cause was decided at a previous term.

The demise in a declaration in ejectment, must be laid as of a day subsequent to that when the lessor's right of entry accrued.

In ejectment by the mortgagee against the mortgagor, or those claiming under him, the demise must be laid as of a day subsequent to a default in payment ; and subsequent to a dissolution of the tenancy by notice to quit, or otherwise.

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Jackron.

The objection and motion were overruled by the court below ; and the defendant excepted.

The verdict and judgment being for the plaintiff below, the cause now came here by writ of error on the record and bill of exceptions.

*W. Hay*, jun. for the plaintiff in error. The plaintiff below was bound to show a complete right of possession prior to the day of the demise. (*Jackson v. Wheeler*, 6 *John*. 272.) The demise should always be laid subsequent to the day when the right of entry accrued. (*Runn. on Eject.* 87. 2 *Chit. Pl.* 444, note. *Wheat. Selw.* 553, 534.) The reason is, because the law rejects fractions of a day. (2 *Bl. Com.* 41.)

The demise should have been subsequent to the forfeiture. In ejectment on a mortgage, it is always deemed material to show the money due, in order to establish the right of entry. (*Jackson v. Fuller*, 4 *John*. 215. *Jackson v. Hopkins*, 18 *id.* 487. *Jackson v. Dubois*, 4 *id.* 221. *Jackson v. Hill*, 10 *id.* 482. *Peterson v. Clark*, 15 *id.* 205. *Jackson v. Bronson*, 19 *id.* 325. *Ives v. Ives*, 13 *id.* 235. *Runyan v. Mersereau*, 11 *id.* 534. *Peterson v. Clark*, 15 *id.* 205. *Ives v. Clark*, 20 *id.* 61.) In all these cases, the money being due is treated as a material fact.

One year's interest is received. By allowing the mortgagee to lay his demise at the date of the mortgage, we allow him to collect mesne profits from that time. (*Jackson v. Randall*, 11 *John*. 405. *Benson v. Matsdorf*, 2 *id.* 369. *Van Alen v. Rogers*, 1 *John. Cas.* 281.)

[The counsel took other grounds ; but as the decision turned on the day of the demise, it is not material to pursue the argument farther.]

To show the power, and duty of the court below to nonsuit, he cited *Foot v. Sabin*, (19 *John*. 154.)

*S. C. Baldwin*, contra. The English common law doctrine places the legal estate in the mortgagee. (*Moss v. Gallimore*, *Doug.* 279. 2 *Bl. Com.* 159.) The mort-



gagor in possession is considered the lessee of the mortgagee. (*Runyan v. Mersereau*, 11 *John*. 534, citing the *King v. St. Michaels*, *Doug.* 630, 632.) The English rule has been fully adopted by this court. (*Johnson v. Hart*, 3 *John. Cas.* 326. *Jackson v. Dubois*, 4 *John. Rep.* 216. *Hitchcock v. Harrington*, 6 *id.* 290. *Jackson v. Hopkins*, 18 *id.* 488.) The only question is, when does the legal estate commence? Common sense would say, when it passes to the mortgagee. At that time the right of entry and possession commences. As between third persons, perhaps the title may be differently regarded; but all the authorities agree, that, as between mortgagor and those claiming under him, and mortgagee, the legal title, and present right of entry are in the latter.

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*Curia*, per SAVAGE, Ch. Justice. The rule is well established, that the demise in the declaration must be laid after the lessor's title and right of entry accrue. (6 *John.* 273.) This rule is not disputed; but the question is, when did the lessor's right of entry accrue in the case before us? This is the only real question in the cause; as the defendant, having taken an absolute conveyance, not acknowledging the mortgage, was not entitled to notice to quit; the sale itself being an act of disloyalty. (18 *John.* 488.)

"It has repeatedly been decided in this court, that, as between the mortgagor and mortgagee, the former is to be regarded as a tenant at will by implication, and is entitled to notice (by which is meant six months' notice) to quit." (18 *John.* 488.) The mortgagor is entitled to the possession; and, so far from being treated as a trespasser before notice to quit, this court has held that he may maintain trespass against the mortgagee. (11 *John.* 538) And in *Jackson v. Bronson*, (19 *John.* 326,) it was decided that the mortgagor might maintain ejectment against the grantee of the mortgagee, who was not also assignee of the debt.

In *Goodtitle v. Herbert*, (4 *T. R.* 680,) it was decided that a tenant at will was not a trespasser. In that case, the

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demise was laid the 1st of *October*, and the demand of possession, which was tantamount to notice to quit, was made on the 5th of the same month. The demand in that case terminated the tenancy, which, not being until after the day of the demise in the declaration, the defendant had judgment.

The mortgagor, in this case, was *quasi* tenant at will; and had he continued in possession, that tenancy must have been terminated by a notice to quit. And until such termination, the mortgagee had no right of entry. The mortgagor, however, chose to terminate the tenancy on the 5th of *July*, 1819, by giving a conveyance in fee absolutely. The first default happened on the 8th of *September*, 1819. Then the mortgagee's right of entry accrued; the tenancy having been previously terminated. But the demise was laid long anterior, to wit, at the date of the mortgage, before the lessor had any right of entry; the mortgage then being a mere chattel, a security for money. To give the mortgagee a right of entry, two things are necessary; 1. Default of payment, in whole or in part; 2. A termination of the tenancy: neither of which had happened at the time of the demise, as laid in the declaration.

The plaintiff below had no right to recover. The court below, therefore, erred. The judgment must be reversed; and a venire *de novo* awarded from *Warren* common pleas.

Judgment reversed.

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De Forest  
v.

B. & A. DE FOREST against FRARY.

FRARY.

ON demurrer to the first and second counts of the declaration.

The first count stated, that on the 7th day of December, 1822, in consideration that one *Wm. Woodworth* was then indebted to *T. Kellogg* and *L. R. Meller*, in the sum of \$200; and that *Woodworth*, having carriages worth \$1000, would and did, at the request and for the benefit of *Kellogg & Meller*, for the security and payment of his (*W.'s*) debt to them, deliver the carriages to the defendant, to be disposed of by him, and out of the avails to pay *K. & M.* their debt; and in consideration that *W.* then, as a part of the same transaction, drew his order in writing, upon the defendant, and thereby requested him to pay to the order of "*T. Kellogg or L. R. Meller*," \$200, whenever the defendant had sold of the carriages to the amount of the order; he, the defendant, accepted the carriages, and took possession of them for the purposes aforesaid; and, in consideration of the premises, then agreed to pay the \$200 to the order of "*T. Kellogg or L. R. Meller*," whenever he had sold of the carriages to that amount: and in pursuance of the agreement, and as part of the same transaction, for the consideration aforesaid, accepted the order, his own proper hand writing being thereunto subscribed by him, for the purposes aforesaid; which order was then delivered to *Kellogg*. That *Kellogg*, for himself and *Meller*, to the order of either of whom the \$200 were made payable, on the same day when it was given, for a valuable consideration paid him by the plaintiffs, transferred, endorsed and delivered the order with the acceptance to the plaintiffs; and thereby ordered and

In an action by the assignee of an order or draft not negotiable, in the name of the assignee against the acceptor, on an express promise by the latter to pay, it is proper to set forth all the circumstances which go to form the consideration of the order.

Where such an order is payable to two persons for a debt due to them from the drawer, one alone cannot assign the order; they being tenants in common of the debt due on the order. And in declaring on an assignment by one, it must be shown that he was a partner with the other, or in some other way had authority to assign, or the declaration will be bad; and this even though the draft be drawn

payable to the order of either of the payees.

An order payable on the sale of certain carriages is not negotiable as an inland bill of exchange; though it be in terms made payable to the order of the payee.

It seems, that in pleading an unsealed assignment of a chose in action, the consideration for such assignment must be set forth at large. It is not sufficient to aver generally, that the assignment was for a valuable consideration paid by the assignee to the assignor.

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appointed the \$200 to be paid to them; and authorized them to demand and receive that sum according to the terms of the defendant's agreement and acceptance. And the defendant, knowing the premises, at the request of the plaintiffs, then promised to pay them the \$200, according to the tenor and effect of the order, &c.

This count then averred, that after these transactions, the defendant did sell and dispose of the carriages to the amount of \$1000.

The second count stated, that on the 7th of Dec. 1822, *Woodworth* was indebted to *Kellogg* and *Meller*, in \$200; and that in consideration of this debt, and that they then agreed to wait on *W.* for a still longer time for payment, *W.* agreed with them and the defendant, that he would deliver, and he did deliver accordingly, a quantity of carriages to the defendant, worth \$1000, to be sold by him to pay the debt to *K. & M.* or their order, when he should have sold to that amount. That *W.* drew his order in writing on the defendant, by which he requested him to pay to the order of "*T. Kellogg AND L. R. Meller,*" \$200, (as in the first count.) That in consideration of the premises, the defendant accepted this order, which was delivered to *Kellogg*. That the defendant sold the carriages, &c. (as in the first count.) This second count then averred an assignment of the order to the plaintiffs in the same manner as in the first count; and that the defendant, with knowledge, and in consideration of the premises, promised as in the first count.

Demurrer, assigning for cause, 1. That the two counts set out the consideration of the order as between *Woodworth* and the payees, to which the plaintiffs were not privy; and the statement did not therefore aid the plaintiffs' claim. 2. That these counts set out the consideration on which the order was accepted, to which the plaintiffs were not privy, and their claim not aided by the statement. 3. That setting out the indebtedness of *Woodworth* to *Kellogg* and *Meller* did not aid the plaintiffs' claim, they not being privy to it. 4. But if it was proper to state such indebtedness, the consideration should

have been stated. 5. That the plaintiffs were not privy to the pledge of the carriages ; and their claim not strengthened by that fact. 6. That the parol negotiations and agreements were set forth, which were extinguished by the making and acceptance of the order. And such negotiations or agreements could not aid the plaintiffs' right. 7. That the first count avers that the transfer and delivery of the order authorized the plaintiffs to demand and receive the \$200, according to the defendant's agreement and acceptance ; whereas the plaintiffs could acquire no right independent of the order and acceptance. 8. As to the second count, that the plaintiffs were not privy to the agreement for delaying payment of the debt due from *Woodworth* to *Kellogg* and *Meller*, mentioned in the second count ; and the plaintiffs' claim not aided by that circumstance. 9. As to the second count, that the plaintiffs were not privy to the indebtedness of *Woodworth* to *Kellogg* and *Meller*, or any agreement concerning the indebtedness ; and the indebtedness or agreement to pay out of the carriages, did not aid the plaintiffs' claim. 10. The tenth cause was inferential from the former causes, that the two counts contained irrelevant and unnecessary matter.

Joinder in demurrer.

*D. B. Tallmadge*, in support of the demurrer. The order was clearly not negotiable, the time of payment being uncertain ; and the payment itself depending on a contingency. No action, then, lies upon the order as an inland bill. The plaintiffs must show a complete title by assignment, before the defendant received the money, in order to entitle them to an action for that money. This they have not done. They should have set forth particularly the consideration of the assignment. An averment generally, for a valuable consideration, is not sufficient. *Andrews v. Beecker*, (1 John. Cas. 411,) *Littlefield v. Storey*, (3 John. Rep. 425,) and *Compton v. Jones*, (4 Cowen, 13,) merely recognize the assignments of choses in action, and declare that the court will protect them ;

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but the manner of pleading the assignment was not drawn in question. In the last case, it is true, the manner is shown. It was general as here. But the point not being made, the case is not an authority in this respect. All the court decide is, that assumpsit will lie on a promise to pay the assignee of a specialty. *Perkins v. Parker*, (1 *Mass. Rep.* 117,) however, raises and decides the point, that the assignee must show the consideration in his pleadings. That case is recognized as authority in *Prescott v. Hull*, (17 *John.* 292.)

Again ; the assignment of the order was not made by both *Kellogg* and *Meller*, the payees. The second count states it as payable to the order of *both*. They were tenants in common ; and one could not divest the title of the other without his consent. (*Sanford v. Mickles*, 4 *John. Rep.* 224.) The plaintiffs, by the assignment, became tenants in common with one of the payees, *Meller*, who did not assign ; and the action should have been in his name, joined with the plaintiffs. There is then a plain nonjoinder, which is always fatal to the plaintiff, in an action arising *ex contractu*. It need not be pleaded in abatement. Would *Meller* be liable as a warrantor of this order in any respect, provided it should prove bad in the hands of the assignees ?

The special causes of demurrer are well taken.

*C. Bushnell*, contra. The matters objected to by the special causes of demurrer, are all parts of the circumstances, which together form the consideration of the original order of *Woodworth*, and the acceptance and agreement of the defendant. All these should be set forth. (*Laves' Pl. in assumpsit*, 31, 49 to 54. 1 *Chit. Pl.* 295, 6. 6 *East* 569, 70. 2 *Chit. Pl.* 10, &c. in the precedents. *Com. Dig. action on the case upon assumpsit*, (H. 3.)

The declaration avers an assignment for a valuable consideration *paid* by the plaintiffs to *Kellogg*. This is the same as if it had said *money* paid. All the precedents, and all the books of reports, agree that this general averment is enough.

The draft was payable, in terms, to the order of *Kellogg* or *Meller*, in the disjunctive. This is equivalent to saying, the assignee of either of them. It authorized *Kellogg*, to whom alone it was delivered, to assign it for a valuable consideration.

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Both counts aver, that the defendant, with full knowledge of all the circumstances, expressly promised to pay the plaintiffs. On this promise, the action can be sustained.

If either of these counts be good, the demurrer being to both, must fail. (*Mumford v. Fitzburgh*, 18 John. 457.)

*Curia, per SUTHERLAND, J.* It is a fatal objection to both counts, that they aver the assignment of the order, which is the foundation of the plaintiffs' action, to have been made by *Kellogg* alone, for himself and *Meller*, without averring that they were partners, or showing, in any other way, the authority of *Kellogg* for that purpose. This draft was payable to the order of *Kellogg* or *Meller*, in the disjunctive, as stated in the first count; out of the proceeds of certain carriages, whenever they should be sold. It was, therefore, not negotiable; and its legal effect is the same as though the word *order* had been omitted. Both counts aver that the consideration of the order, was a debt due from *Woodworth* to *Kellogg* and *Meller*. They were tenants in common, therefore; and neither had a right to assign, without the express authority of the other. The second count avers that the draft was payable to the order of both. We cannot presume a partnership. It should be averred; so that the defendant may have an opportunity of contesting it.

The plaintiffs having failed to show a legal title to the order, the consideration for the defendant's promise fails; and the plaintiffs cannot recover.

The special causes of demurrer are not well taken. It was necessary for the plaintiffs to show the original consideration of the order and acceptance; and the matters objected to, all go to form that consideration. (*Laves' Pl. in assumpsit*, 31, 49. 1 Chit. Pl. 295, 6.)

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I am inclined to think the general averment, that the assignment was for a valuable consideration, is not sufficient. The consideration should have been stated at large. (1 *Mass. Rep.* 117. 17 *John.* 292.) On this latter point, however, it is not necessary to express a definitive opinion.

The defendant must have judgment, with leave to the plaintiffs to amend on the usual terms.

Rule accordingly.

HOMER *against* MARTIN and GILMAN.

The interrogatories under a commission to examine witnesses, issued pursuant to the act, (*sess.* 36, *ch.* 56, *s.* 11, 1 *R. L.* 519, 20,) may be signed by counsel, without the addition of his character to the signature. It is enough that he is, in truth, a counsellor.

A judge of the C. P. of the degree of counsel in the supreme court, may direct as to the return of a commission, within the act, (*sess.* 45, *ch.* 217, *s.* 2.)

ASSUMPSIT, tried at the *New-York* circuit, *January* 20th, 1826, before EDWARDS, C. Judge.

At the trial, the plaintiff had no evidence to sustain his action except what was derivable from a commission issued in his behalf, and executed in the cause at the city of *Boston*. The direct interrogatories administered under this commission, were signed by the attorneys for the plaintiff, thus: "*Ward and Hoyt, Atts. for Pltff.*" They were, in truth, at the time of signing, counsellors of this court; but no addition to that effect was made to their signature. The interrogatories were allowed by the first judge of the C. P. of *New-York* by an endorsement thus: "allowed this 6th day of *May*, 1825, *Jno. T. Irving.*"

On the 6th of *May*, 1825, before the commission was sealed up, judge *Irving* endorsed the following order on the back thereof: "After this commission shall have been executed agreeably to the instructions annexed, let one of the commissioners put the sealed packet into the post office at *Boston*, stating on the back that the same

So the first judge of the C. P. of *New-York*.
Form of the direction.

A direction to return the commission by mail, directed to one of the clerks of the supreme court, is complied with, if the commission be delivered from the post office to the clerk, by any of the ordinary means, as by a messenger, the penny post, &c. Nor is it any objection that it be delivered by the attorney for one of the parties. The true question is, was it delivered to the clerk in an unaltered state. If the court be satisfied there has been no abuse, it may be received in evidence.

had been so put into said office by him, and signing his name to said endorsement. The packet, when sealed up by the commissioner, will be addressed to the clerk of the supreme court at the city of *New-York*. *May 6th, 1825.*

John T. Irving."

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It appeared by the post mark and certificate, that the packet was mailed at *Boston*, *June 3d, 1825*, and was endorsed by the deputy clerk of this court at *New-York*, on the 6th of the same month, "received and filed:" but that previous to so endorsing or filing the commission, the penny post had carried the packet to the deputy clerk at the office, who refused to pay the postage; wherefore the penny post took the packet down to the office of the plaintiff's attorneys to get the postage. They received the commission, and paid the postage. One of the plaintiff's attorneys then took the packet to the office of the defendant's attorney, who objected to the irregularity of its being in the plaintiff's attorneys' possession. He, the plaintiff's attorney, then took it to the clerk's office, where it was filed and endorsed.

The direction on the cover of the commission was thus:
"New-York, Supreme Court.

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v.		
<i>Alexander Martin and</i>		
<i>Robert Gilman.</i>		

To *James Farlie*, Esquire, clerk of the supreme court,
City Hall, city of *New-York*."

It was also endorsed: "Put into the post office in the city of *Boston*, this 3d day of *June, 1825*, by *Josiah P. Cook*, commissioner."

The defendants' counsel objected, that the depositions taken under the commission should not be read; 1. Because of the irregular manner in which the return came to the clerk's office; but the judge overruled the objection. 2. Because Judge *Irving* had no authority to make the order as to the mode of return. This objection was also overruled. 3. That the direct interrogatories were not signed

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by counsel; whereupon proof was offered that *Ward* and *Hoyt* were in fact counsel, at the time of signing. The judge rejected this proof; and with it the commission and return; and the plaintiff was nonsuited.

J. Hoyt, for the plaintiff, now moved to set aside the nonsuit, and for a new trial. He cited the statutes, *sess.* 36, *ch.* 56, *s.* 11, 1 *R. L.* 519, 20; *sess.* 45, *ch.* 217, *s.* 2, *p.* 226, to show the manner in which commissions may be executed and directed to be returned. The section last cited, he said, confides the direction to a commissioner of the court; and the statute, *sess.* 36, *ch.* 16, *s.* 1, 1 *R. L.* 322, authorizes the appointment of commissioners for *Oneida* and *Ontario*, declaring their powers, and conferring on them the same authority at chambers as a judge of this court possessed.

Then came the statutes, *sess.* 41, *ch.* 195, *s.* 1, *p.* 173, and *sess.* 44, *ch.* 72, *p.* 64; the former extending the powers of commissioners to judges of the C. P. who are counsellors of this court; and the latter erecting the C. P. of *New-York*, requiring the first judge to be of the degree of counsel, and the 12th section restraining the application of the act, *sess.* 41, *ch.* 195, to the first judge of that court. The 3d section of the act, *sess.* 44, *ch.* 72, gives the same power to the C. P. as then belonged to the mayor's court of that city.

Talcott, (attorney general) contra. The statute, *sess.* 36, *ch.* 56, *s.* 11, directs the interrogatories to be signed by the party or his counsel. This statute being in derogation of the common law, must be strictly followed. (20 *John.* 361.) It is not enough that the person signing is in fact counsel. He should appear to be so on the face of the proceedings. They should speak their own regularity. This is always so in relation to the signature to special pleas; (*Dubois v. Dubois*, 5 *John. Rep.* 235, 6;) and *a fortiori*, as to interrogatories under a commission.

The order was to deliver the commission to the clerk. This court can make no new order. Suppose the penny post had delivered the commission to A., and he to B.; and

it had thus passed round through half the city to the hands of the attorney ; it must be received, within the doctrine contended for on the other side. Is there any safety in such a practice ?

But the judge had no authority to make the order. The statute of 1818, (*sess. 41, ch. 195, s. 1.*) did not mean to confer on the judges of the C. P. all the powers which might *thereafter* be given to commissioners appointed under the act of 1813, (*sess. 36, ch. 16, s. 1.*) The words of the act of 1818, are, "to do all the duties, and exercise all the powers which *are given*, to such commissioners by any subsequent acts of the legislature ;" not *which shall be* so given. The power conferred by the subsequent statute of 1822, (*sess. 45, ch. 217, s. 2, p. 226.*) is confined in terms to a judge of this court, or commissioner. There being no prospective words in the act of 1818, judges of the C. P. take no power under the statute of 1822. This construction is warranted by *Jones v. Reed*, (1 *John. Cas.* 20.) Judges being an inferior jurisdiction, can take nothing by implication. The statute (*sess. 44, ch. 72.*) confers no power on the first judge of the C. P. of the city of *New-York* to make this direction. Suppose his powers to be the same with those of the judges of the mayor's court under the statute relating to the mayor's court of *New-York* ; (*sess. 36, ch. 85, 2 R. L. 501 ;*) no such power as is here exercised will be found there. But if it was conferred by that act, it is not adopted by the act organizing the C. P. (*sess. 44, ch. 72.*) The 3d section of the last act refers merely to the power of the former mayor's court considered collectively ; and the 12th section is restrictive merely. The creation of a new court of C. P. will not give this power to its judges. The act of 1822 did not mean, that any common pleas judge, in any part of the state, of the degree of counsel, should have power to give these directions. It is even a greater power than this court itself possesses, who can only direct a return by mail. (*Sess. 45, ch. 217, s. 1.*) The consequences of the construction contended for should be looked to. (*Bac. Abr. statute* (1) *pl. 10.*)

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Hoyt, in reply. Most likely the direction in this case was literally complied with: the clerk had the commission in his hands before he looked at the amount of postage. Neither the statute nor order, provides negatively that the commission shall not come to the hands of the attorney. The accident of its coming there is matter of regularity; and the effect of this accident must be declared by the court upon their rules of practice. No one has been injured. It was not 5 minutes with the attorney. It was usual formerly to deliver the commission to the attorney in the first instance; though not perhaps strictly justifiable within the act. (*Caines' Pract.* 426.) The commission being delivered back by the clerk to the penny post, he may be considered the agent of the clerk.

We submit to the examination of the court the various statutes on which the powers of judge *Irving* must rest. The practice has been to consider judges of the C. P. of the degree of counsel, commissioners within the act of 1822.

Curia, per WOODWORTH, J. The statute directs that the interrogatories be signed by the parties, or their counsel. They were signed by *Ward* and *Hoyt*, attorneys for the plaintiff; and approved by the judge. Proof was offered that *Ward* and *Hoyt* were counsel. I think this sufficient. The fact that they were counsel was a compliance with the act; although they were not described as such. The strictness applicable to special pleas was, I apprehend, never intended. This is evident from the statute allowing the party, as well as his counsel, to sign. No good reason can, in my view, be assigned, for rejecting the evidence, because the names were not followed by the addition of counsel.

The statute, (*sess. 45, ch. 217, s. 1.*) authorizes the judges to prescribe a return of the commission by mail, to be directed to one of the clerks of this court, and to be by him opened and filed in his office. This duty may be performed by a single judge. (*id. s. 2.*) The power was rightfully exercised by judge *Irving*, who has the power of a judge of this court in vacation.

There is no express provision as to the manner of conveying the commission from the post office to the clerk's office. I think it may safely be concluded, that the legislature were satisfied to leave the transmission from the one office to the other, to the usual course, and the vigilance and care the court would exercise when there was any suspicion of unfairness and fraud. The manner letters are taken from a post office was undoubtedly known.

Some times the person to whom the letters are addressed, calls and receives them. Perhaps more frequently they are sent for by a messenger. At other times, they may be delivered by a penny post. A delivery in either way is sufficient. It will not be pretended that the clerk must attend personally and receive the commission from the office. If that ground be abandoned, it follows that a delivery to any person is allowable.

The only question would seem to be, was the commission delivered to the clerk, in the same state as when received from the post office. The attorney of the party is not disqualified from being the medium of conveyance. If he has discharged the duty faithfully, the commission should be received; and is no more objectionable on that ground, than if the penny post, or the clerk's messenger, had been the carrier. The commission has been opened by the clerk, and filed in the office. There is not a suggestion that it was opened by any other person. The nonsuit must be set aside, and a new trial granted.

New trial granted.

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An intermediate endorser of a promissory note, tho' he did not hold the note when it became due; yet must, in an action against a prior endorser, for the money paid by him, (the intermediate endorser) to a subsequent endorsee, to take up the note, prove a regular demand of payment and notice to the defendant, the same as in an ordinary action against an endorser.

The register of a deceased notary is not evidence of demand and notice on a promissory note, where the entries were made by his clerk, who is still alive; though he be gone out of the jurisdiction of the court, and cannot be found on diligent enquiry.

What one swore on a former trial cannot be given in evidence unless he be dead. That he is beyond reach of process of subpoena, and cannot be found on diligent enquiry, will not render such proof admissible.

To render what a witness swore on a former trial admissible, it must have been between the same parties, and the point in issue the same.

The words of the witness must be given; not what is supposed to be the substance of his testimony.

WILBUR, survivor of *Doremus*, against SELDEN, impleaded with *Richards*, survivors of *Ogden*.

ASSUMPSIT by the plaintiff, an endorsee, against the defendants, endorsers of a promissory note. The declaration stated that the note was for \$800, payable to *Canfield & Co.*; by them endorsed to the defendants; by them to *Doremus & Wilbur*, (the latter of whom, as survivor of *Doremus*, is the plaintiff;) by them to *Bostwick & Sterling*; and by them to the *Bank of New-York*. It then averred a demand of the makers, and notice of non-payment to all the endorsers, and a payment by the endorsers respectively, who were subsequent to the defendants.

The cause was tried at the *New-York* circuit, *March 30th*, 1824, before EDWARDS, C. Judge; when, after proving the note paid and taken up as averred, one question was, whether demand of payment had been made, and notice given to the defendants.

To prove this, the notarial register of *John Wilkes*, the notary of the bank, was offered in evidence by the plaintiffs. All the entries in this book, were in the hand writing of one *Scott*, *Wilkes'* clerk, who transacted his business, and who had left the city of *New-York*, declaring that he was going to the back parts of *Pennsylvania*, and could not be found on diligent inquiry. The register was rejected by the judge.

The plaintiff then offered to prove what *Scott* had sworn to on the trial of an action before brought by *Doremus & Wilbur* against *Selden*, *Richards* and *Ogden*, to recover the sums which the former had paid to the holders of the note in question, in satisfaction of their liability as endors-

ers, and one of which sums was the amount now claimed. This evidence was objected to, but admitted by the judge.

H. D. Sedgwick, one of the counsel in the former cause, was then sworn for the plaintiff; and said he could not state with precision what *Scott* swore to, and could not recollect the phraseology of the witness. His testimony was therefore objected to; but the judge allowed him to state his recollection of the substance of what *Scott* swore to; and he produced his notes of *Scott's* testimony; but did not pretend that they contained *Scott's* exact words or phraseology.

The defendants excepted upon the above points; and the verdict being for the plaintiff, he now moved for a new trial.

G. Griffin, for the defendant. The testimony of Mr. *Sedgwick* should not have been received. The former trial was not between the same parties, or for the same cause of action; and it did not appear that *Scott* was dead. Nor could Mr. *Sedgwick* repeat the words or phraseology of *Scott*. (1 *Phil. Ev. last Am. ed.* 199, 200, and note. 17 *John.* 179. *Le Baron v. Crombie*, 14 *Mass. Rep.* 234. *Bull. N. P.* 243. 4 *T. R.* 290, per *Ld. Kenyon*, *C. J.* *Lightner v. Wike*, 4 *Serg. & Rawle's Rep.* 203.)

R. Sedgwick and *H. D. Sedgwick*, contra, denied that the plaintiff, being a subsequent endorser, and holding the note when it fell due, was bound to show a regular demand of payment and notice to a prior endorser. They said the most that can be required is, that he should show notice to the party he means to charge, of having actually paid and taken up the note, within a reasonable time after so doing. In this case, the plaintiff seeking to recover only what he has paid, no notice whatever was necessary.

[They were proceeding to argue in support of these propositions; but the Court told them, the law was so well settled against them, that they could not sit to hear the argument.]

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In support of the proposition that the evidence of what *Scott* had sworn, was admissible, especially in connexion with the record made by him in the notarial register, they cited *Sluby v. Champlin*, (4 *John Rep.* 461;) *Cook v. Woodrow*, (5 *Cranch*, 13;) *Clark v. Sanderson*, (3 *Bin. Rep.* 192;) *Jackson v. Gager*, (5 *Coven's Rep.* 383;) *Welch v. Barrett*, (15 *Mass. Rep.* 380;) *Halliday v. Martinet*, (20 *John. Rep.* 168;) and *Mayor of Doncaster v. Day*, (3 *Taunt.* 261.)

Curia, per SAVAGE, Ch. Justice. The only question is, as to the competency of the testimony objected to.

The books of a deceased notary have been received in evidence, when the entries were made by the notary himself; but when they are made by a clerk, the notary does not attest to them; and in that case the evidence of the clerk is higher. And indeed the book, unaccompanied by his testimony, would prove nothing. (20 *John.* 172, 3, and the cases there cited.)

The rule as to admitting what a witness swore upon a former trial, is supposed to be this: That to render such testimony admissible, it must be between the same parties, and the point in issue the same; and the words of the witness must be given, not what is supposed to be the substance of his testimony. The witness must also be dead. (1 *Phil. Ev.* 215. *Bull. N. P.* 243. 4 *T. R.* 290. 14 *Mass. Rep.* 234. 4 *Serg. & Rawle's Rep.* 203.)

In this case, the parties are substantially the same; the cause of action is the same, and the point in issue the same. But the witness, *Scott*, is not dead. He is absent, in the state of *Pennsylvania*; and, possibly, upon inquiry there, he may be found, and examined upon commission.

It is urged by the plaintiff's counsel that the case is analogous to one of a subscribing witness to a bond, whose signature may be proved, if he be absent; and the proof of which establishes the execution of the bond, without proof of the signature of the obligor. That rule rests upon the presumption that the parties have selected the witness to

testify to the execution ; and, therefore, proof of his signature, is proof that the bond was executed in his presence. The rule is certainly a very dangerous one ; but too well established to be now controverted. (5 *Cranch*, 13. 3 *Bin.* 192. 4 *John.* 467.) It is not, however, at all analogous in principle to the one contended for in this case. No special confidence can be charged upon the defendants. They could not control the bank in the selection of its notary ; nor the notary in the selection of his clerks. The witness, *Scott*, was never selected by the parties to testify between them ; nor was he called to testify to their acts, but his own.

In *Le Baron v. Crombie*, (14 *Mass. Rep.* 36,) the supreme court of *Massachusetts* refused to hear what had been sworn to by a witness who, though naturally alive, was civilly dead, having been convicted of felony. They say the rule in *England* is limited to the case where the principal witness is dead. If, however, the death of the witness were not an indispensable circumstance, there is yet another difficulty. Mr. *Sedgwick* could not state the words of the absent witness ; but only the substance of his testimony. He produced the notes which he took as counsel on the former trial ; but whether he testified from these or from recollection, does not appear in the case. The rule laid down by Lord *Kenyon*, (4 *T. R.* 290,) is, that the words must be given, and not the effect of them ; and the reason is, because the jury are to judge of the effect of the testimony, and not the witness. In *Lightner v. Wike*, (4 *Serg. & Rawle's Rep.* 203,) chief justice *Tilghman* shows, very satisfactorily, the reason of the rule ; and also that notes of counsel should not be relied on, as it is not their practice to take the words, but the substance, as they understand it. And he remarks, that during a trial, the ideas of counsel pass through a medium which diverts them from a right line.

The case of *Doncaster v. Day*, (3 *Taunt.* 261,) does not contradict the rule, that the words must be given ; but holds that they may be given from notes or memory, provided the accuracy be sworn to.

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I am of opinion that this evidence was improperly admitted, and that a new trial should be granted.

New trial granted.

WILLIAMS against SMITH.

Indebted against the toll-gatherer of a turnpike company, for the penalty imposed by the 16th section of the act relative to turnpike companies, (1 R. L. 236,) for shutting the gate and taking or demanding toll, after the commissioners of inspection have ordered it to be opened; it is not a principal cause of challenge to a juror, that he is a stockholder of the company.

The company are not accountable, in any event, on account of the recovery; but otherwise as to a recovery upon the 9th section.

ON error from the C. P. of *Tioga*. The cause came to that court by appeal from a justice's court. The action was by *Williams* against *Smith*, for \$10 debt, for the defendant's unlawfully demanding and taking toll of the plaintiff at the middle gate on the *Ithaca* and *Owego* turnpike road. In the common pleas, *Charles Pumpelly*, a stockholder of the corporation who owned the road, was drawn as a juror. He was challenged, therefore, by the plaintiff, who at the same time admitted that the defendant was able to pay the judgment claimed against him. The court overruled the challenge, and the juror was sworn, and sat and tried the cause.

It was admitted by the parties at the trial, that the road being completed, and officers appointed according to the act of *March 13th*, 1807, and the other acts, &c.; afterwards, on the *23d* day of *July*, 1824, the commissioners of inspection certified that the road was out of repair; and ordered the middle gate to be opened till further orders. Afterwards on the *23d* day of *September*, 1824, two of the commissioners certified that they had viewed the road, found considerable repairs made, and that some remained to be done, specifying what and where, and how they should be done; and from the assurances given

After a turnpike gate has once been opened by order of the commissioners of inspection, because the road is out of repair, it cannot be lawfully shut, and toll demanded, until one of the commissioners certifies that the road is in sufficient repair. And where the certificate stated that the road was still out of repair, but that the contractors had given assurances that it should be repaired, and directed the gate keeper to shut the gate; and he did so, and demanded and received toll; *held*, that he was liable to the penalty of \$10 within the 16th section of the act relative to turnpike companies, (1 R. L. 236.)

The certificate of a commissioner in due form, is conclusive; and will protect the toll-gatherer.

by the contractors that the repairs would be done, they directed the keeper of the middle gate to shut it, and keep it shut till further orders. After this certificate was given, to wit, in the spring of 1825, the plaintiff passing the gate with a waggon and two spans of horses, the defendant demanded, and the plaintiff paid 75 cents, which was according to the legal rate of toll.

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The plaintiff objected that the last certificate was insufficient. The court below overruled the objection, and charged the jury in favor of the defendant. The plaintiff excepted. Verdict and judgment for the defendant.

The statute in question, is the general act relative to turnpike companies, passed March 13, 1807, sess. 30, ch. 38, 1 R. L. 228.

E. Griffin, for the plaintiff in error, contended that *Pumpelly* was not an impartial juror; and that the defendant had no right, under the statute, to shut the gate, till the commissioners should certify that the road was in sufficient repair.

H. Bleeker, contra, cited 2 *Coven*, 551; 2 *Caines*, 179; and 1 *Coven*, 251.

Curia, per SUTHERLAND, J. *Pumpelly* was a competent juror. The company of which he was a stockholder, are not responsible, in any event, on account of a recovery against the toll-gatherer, for a violation of the 16th section of the statute under which this action was brought, (1 R. L. 236.) For delay or extortion by the toll-gatherer, under the 9th section, the company are responsible, if the penalty cannot be collected from the goods and chattels of the defendant. That provision is not incorporated into the 16th section. The toll-gatherer may be imprisoned on any judgment upon the 16th section; but not under the 9th.

The certificate of the 23d of *September*, 1824, did not authorize the toll-gatherer to shut the gate and demand toll. The 16th section directs, that when a gate shall be opened, by order of the commissioners, &c. it shall be opened,

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“and shall remain open, and no toll shall be demanded in passing the same, until a certificate is received by the person keeping such gate, under the hand of one of the commissioners aforesaid, that such road is in sufficient repair, and granting permission to shut such gate.” The certificate must not only contain a permission to shut the gate, but it must also declare the road to be in sufficient repair. When a gate is once opened by order of the commissioners, it cannot be shut again until the road is put in sufficient repair. Whether it is in sufficient repair or not, it is undoubtedly the province of the commissioner to determine; and if he will certify that it is, and order the gate to be shut, the toll-gatherer incurs no hazard in obeying the order. But if, as in this case, it appears on the face of the certificate, that the road is not in repair, and the order to shut the gate is founded on the alleged expectation that the road will be repaired, and not on the fact that it has been, the toll-gatherer is bound to know that the order is unauthorized; and he obeys it at his peril. There is no hardship in this. He is not responsible for the truth or falsehood of the certificate. All he has to do, is to see that it assert the fact that the road is repaired; and, on that ground, permits or orders him to shut the gate.

The judgment below must be reversed; and a venire *de novo* awarded by the *Broome* common pleas.

Judgment reversed.

THE MAYOR, ALDERMAN, AND COMMONALTY OF THE
CITY OF NEW YORK, *against* STAPLES.

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ON demurrer to the defendant's second plea. The action was debt for \$500, under the 252d section of the act to reduce the several laws, relating particularly to the city of *New-York*, into one act. (2 R. L. 441.) The declaration recited the 251st, 252d and 255th sections of that act; together with the 1st and 4th sections of the statute, (sess. 43, ch. 222;) and averred that the defendant was master of the schooner *Penobscot Packet*; and on the 1st of July, 1823, he arrived in the port of *New-York* from *Halifax*, and entered the schooner at the custom house. That a certain alien was brought in the schooner; and suffered to land before any bond had been given, as required by the 252d section, though it was required by the mayor, in the penalty of \$300; and without any permission in writing from the mayor or recorder as required by that section.

The second plea was, that neither the mayor nor recorder of *New-York* ever required the bond from the defendant, concluding with a verification.

Demurrer and joinder.

M. Ulshoeffer, in support of the demurrer. The master had no right to land an alien passenger, without both a bond and permission in writing under the 252d section. The permission is the only evidence that the bond is dispensed with. The plea is also bad, because it justifies, without confessing the landing. If we were bound, in assigning the breach, to negative both bond and permission,

report by the master, for the mayor or recorder to require a bond; when it must be given. If not required, or if required and given, the master must then demand a permission in writing from the mayor or recorder, to land his passenger; when, if it be granted or refused, he may land. But a permission, or demand and refusal, is essential to the right. A bond only, or neglect to demand one, is not enough.

The statute is not, in this respect, void, as being contrary to the constitution of the United States.

If a master of a ship, or other vessel, arriving from a foreign country, or any other of the United States, who shall enter his vessel at the custom house in the city of *New-York*, suffer an alien passenger to land there, without giving, if required, pursuant to the statute, (sess. 36, ch. 86, s. 253, 2 R. L. 441,) such bond as is required by that section, or without such permission in writing as is required by that section, unless it be refused on demand, he incurs the penalty of \$500, mentioned in that section.

The course to be pursued under the 251st, & 252d sections of that act, as to an alien passenger, is, on

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the plea must be equally broad. (1 *Chit. Pl.* 327. *id.* 509. 26 *John.* 206. 18 *id.* 30.) As a plea to the whole declaration, we could not traverse it. Unless the negative to a permission is mere surplusage, it should be met. (3 *John. Rep.* 206. 2 *East*, 452.) The defendant at least should have shown by his plea, that he applied to the mayor or recorder for a permission. Till that is done, they know nothing of the landing. The statute should be construed according to the reason of the case. (3 *Cowen*, 89.) The excuse must be fully shown. (1 *Gall.* 157.) A permission, if granted, should have been pleaded in the very words of the statute. (6 *T. R.* 720.)

*R. Sedgwick* and *H. D. Sedgwick*, contra. If the master reports his passengers, and the mayor and recorder neglect to require a bond, the penalty does not attach. A permission is never required after the master has reported his passengers, unless a bond is first required by the mayor or recorder, and the penalty is named, and the master delays or neglects to give the bond. The naming of the penalty, and requiring the bond, should precede the action for the penalty of the statute. This being denied by the plea, it is sufficient. They cited *Bac. Abr. statute* (1) *pl.* 10.

They also contended that the statute is unconstitutional and void. *Gibbons v. Ogden*, 9 *Wheat. Rep.* 1.)

*Curia, per* WOODWORTH, J. The act relative to the city of *New-York*, (2 *R. L.* 440, s. 251,) declares, that every master or commander of any ship, or other vessel, arriving from a foreign country, or from any other of the *United States*, shall, in the manner specified by that section, make a report of every person who shall have been brought as a passenger. The 252d section declares, that the mayor, or, in case of his sickness or absence, the recorder, may require every such master to be bound with sureties, in a sum not succeeding \$300 for each passenger, to indemnify and save harmless the plaintiffs from all expense and charge which may be incurred for the maintenance and

support of the person imported, in case such person shall, within two years, become chargeable; and if any such person, so brought, and not being a citizen of the *United States*, shall be permitted or suffered to land within the city, from any such ship or vessel, before such bond shall have been given, and without a permission in writing, from the mayor or recorder, the master or commander shall be subject to the penalty of \$500.

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The declaration alleges, that the defendant was master of a schooner; that he arrived at *New-York* from *Halifax*, and brought an alien passenger, who was permitted to land before such bond was given, although it was required, and without a permission in writing from the mayor, or recorder.

The defendant pleads that neither the mayor nor recorder ever required the bond. To this plea there is a demurrer.

The decision of this cause depends on the construction to be given to the act. The course contemplated by the statute to be pursued, appears to be this: On making the report by the master, the mayor or recorder should require a bond to be given, in a sum not exceeding \$300. As the penalty rests, in part, in their discretion, it is necessary that the master be informed in what sum he is required to be bound, before he can comply with the law. This part of the act relates to the duty imposed on the mayor or recorder. By the demurrer, it is conceded they have neglected the duty. Consequently, the defendant had not the information, requisite to enable him to execute such a bond as the statute requires.

If the act had merely directed the master to execute the bond, on being required, the defence would be complete. But the act goes farther; and makes the master liable, if the passenger is suffered to land without a permission in writing. There must be a bond, and also a permission in writing. The act is not in the alternative. Both requisitions must be complied with. If the mayor or recorder neglect to require a bond, or dispense with it, that is a

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sufficient excuse for the master, so far as respects the bond; on the principle, that if he who is to do the first act, prevents the act which is to follow on the other side, or is the cause of its non-performance, he shall never urge the omission as a breach. The liability then, if any, arises on the want of a permission in writing. The legislature have thought proper to require it in express terms. Whether it has the appearance of unnecessary strictness, we do not stop to inquire. It was, undoubtedly, considered as an additional precaution, adapted to the exigency of the case. After giving the bond, or after a neglect to require it, the master would have a right to demand the written permission. If it should be withheld, and if the refusal should be persisted in, he would then be justified in landing his passengers, on the ground that the plaintiffs, having refused a permission, which it was their duty to grant, and the master, having done every thing on his part required to be done, according to the intent and spirit of the act, the forfeiture is not incurred. The defendant here, has not placed his defence on this ground. The plea concedes there was no permission to land given: whether, by reason of a refusal to grant it, on request, or the omission of the defendant to make the request, does not appear. No cause is assigned. The plea, therefore, is defective in substance.

Judgment must be entered for the plaintiffs, with leave to the defendant to amend, on payment of costs.

Judgment for the plaintiffs.



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Aug. 1825.

Ward  
v.  
Green.

WARD & WARD against GREEN.

ON error from the C. P. of *New-York*. The action below was assumpsit by *Green* against the *Wards*. The declaration contained the common money counts.

On the trial, it appeared, that the defendants were, on the 27th of *June*, 1825, the owners of the ship *Morgiana*, *James Allen*, master. The plaintiff below gave in evidence the following receipt, signed by the master: "Received of *Benjamin Green*, (the plaintiff below) two hundred and seventy Spanish dollars, deliverable at *New-York*, dangers of the seas excepted, unto the said *Benjamin Green*, one  $\frac{1}{2}$  per cent. primage. *New-Orleans*, the 27th of *June*, 1825." On this testimony the plaintiff below rested.

The defendants below then gave in evidence the freight list of the ship, dated *June 28th*, 1825, containing various articles, in the name of various shippers, on various consignments, which did not include the dollars. Also a receipt signed by one of the defendants, *Henry Ward*, of even date with the above receipt, acknowledging the receipt of \$15 of the plaintiff, as his, the plaintiff's passage money to *New-York* in the steerage. They farther proved that the plaintiff below was a passenger in the ship to *New-York*; and that *Henry Ward* sailed as supercargo. And it was admitted by the parties, that the contract to transport the specie, was made with the master without the knowledge of *Henry Ward*, the part owner and supercargo; and that he knew nothing of the contract till after the master alleged that the specie had been stolen.

The court below charged that the master of a vessel is, when abroad, generally the agent of the owners, and is, from his station in the vessel, empowered to attend to the shipment of the cargo, and make contracts in relation to

for transportation, without the knowledge of the owners, and which were not put in the freight list; the money being stolen on the voyage; *held*, that the owners were liable.

What shall be deemed a general ship.

The master of a vessel, when abroad, is the agent of the owners; and has power to make contracts in relation to freight, which are binding upon the owners. When an owner is on board, and exclusively attending to the shipment of the cargo, he is not bound by the master's contract. But, to relieve himself from liability, he must show the fact that he was exclusively attending to the shipment of the cargo. And he must show the same thing, though he was on board as supercargo.

It is not enough that one of the owners is on board as supercargo; and where this was the case, and the master of a general ship receipted dollars

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the freight, which are binding upon the owners. That when an owner is on board, and exclusively attending to the shipment of the cargo abroad, and to making contracts in relation to the freight, the owners are not bound by any contracts of the master in relation to the freight. But it is incumbent on the owner to show, in order not to be affected by the engagements of the master, that he was thus exclusively attending to the shipments and the making of contracts. And that, although by an arrangement between one of the defendants and his co-partner, the other defendant, the latter was made the supercargo of the vessel, yet, being at the same time owner, the same proof that he was exclusively attending to the shipment, and the making of contracts, was necessary. Otherwise, the contracts of the master are binding. Under this direction, the jury found for the plaintiff below ; and the defendants below excepted to the charge, and prosecuted their writ of error, on the judgment and a bill of exceptions.

*J. L. Graham*, for the plaintiffs in error. The owner being present at the time of the theft, the carrier is not liable. (2 *Com. on Cont.* §30.) To make the owner liable, the property should have been mentioned in the freight list. That the whole was a matter between the bailor and the master, is evident from the payment of *primage*, which is defined to be a duty at the water side, payable to the master and mariners. (*Jac. L. Dict. Primage.*) The payment of passage money by *Green* to *Henry Ward*, one of the defendants below, shows that the former knew in what character the latter was acting. The defendants below were not bound to show that the supercargo and part owner attended exclusively to the shipments. *Walter v. Brewer*, (11 *Mass. Rep.* 99,) is in point for the plaintiffs in error. (See also *Boucher v. Lawson*, *Rep. Temp. Hardw.* 83. *id.* 183. *Poth. Mar. Cont. Cushing's ed.* 27.) The owners can only be chargeable on a bill of lading, to which the receipt was not equivalent. It does not mention the name of the vessel. *Allen* did not sign as master, and no freight is specified.

*P. W. Radcliff*, contra. Any objection not taken at the trial cannot be raised here. (15 *John*. 338.) The owner of the property being present, the rate of primage, and receipt not amounting to a bill of lading, are out of the question. So, whether the verdict be against evidence. The argument is confined to the point in the bill of exceptions. (14 *John*. 304. 2 *Caines'*, 168. 8 *John*. 495.) Of course, the court have nothing to do with the objection, that the property was not mentioned in the freight list.

The only question really presented by the bill of exceptions, is, whether the master's contract, under the circumstances of the case, was obligatory upon the owners. He may bind his owners for the carriage of goods within the ship's usual employment. (*Abb. on Shipp. pt. 2, ch. 2, s. 2, 3, 4.*) The owner was on board as supercargo only; having nothing to do with the employment of the ship or procuring of freight. She was a general ship for the carriage of merchandize; not sent out for a special purpose, or intended exclusively, or at all, for the owner's use. This appears from the freight list. *King v. Lenox*, (19 *John*. 235,) shows the true rule and its exceptions. So also *Waller v. Brewer*, (11 *Mass. Rep.* 99,) cited on the other side. The court below laid down the law correctly.

*Curia, per SAVAGE*, Ch. Justice. *Abbott on Shipping*, in treating of the liability of the owners, on the contracts of the master, states that the owners are bound to the performance of every lawful contract made by the master, relative to the usual employment of the ship. The master is the confidential agent of the owners at large, and is entrusted with the conduct and management of the ship. It often happens that no contract can be made with the owners personally, as where the ship is in a place distinct from their residence. But even when the ship is at the place of their residence, and is intended to be employed as a general ship, it rarely happens that the owners interfere with the receipt of the cargo; and without doubt they are legally bound to perform every contract made by the

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master relative to the usual employment of such a ship. (*Abbott, part 2, ch. 2, s. 2, 3, 4.*)

A general ship is defined to be one in which the master or owners engage separately with a number of persons, unconnected with each other, to convey their respective goods to the place of the ship's destination.

There can be no doubt that, in this case, the ship was a general one; and the owners are liable for the performance of the master's contract, unless they are discharged by reason of one of the owners being present at *New-Orleans*, and acting as supercargo.

The case of *Boucher v. Lawson*, (*Rep. Temp. Hardw. 83, 183, Abb. on Sh. 119, S. C.*), was an action against the owner, to recover the value of *Portugal* coin, delivered to the master at *Lisbon*, to be conveyed to *London*; and of which, by the usage of that particular trade, the master was to receive the freight to his own use; and which he had embezzled. The court held, that if it had appeared that the ship was employed in "carrying goods for hire, the owner would have been answerable for the loss. But as that did not appear, and possibly the ship might have been sent for a special purpose, the master could not charge the owners, by taking in goods contrary to his duty.

In the case of *King v. Lenox*, (*19 John. 236*), the general liability of the owner is asserted as I have before stated it; but in that case, the owner was held not responsible, because the ship was freighted wholly by him. The master, therefore, had no authority to receive goods on freight. The contract was, consequently, deemed to be made with the master in his individual capacity, and not as agent of the owners. In the case of *Walter v. Brewer*, (*11 Mass. Rep. 99*), the owner went in the ship, intending to freight her himself. The ship was not advertised for freight, nor did she bring any from *Montevideo*; but the cargo belonged to the owner, except the bales of skins which the master received from the plaintiff, and stowed away secretly. The judge instructed the jury that the owners were generally liable on the contracts of

the masters abroad on the voyage ; but as the owner had gone in the ship to procure a cargo ; as the ship was not put up for freight ; and as the defendant was not consulted, but the goods were taken on board without his knowledge, he was not liable. But had the owner known of the shipment of the goods before he left *Montevideo*, he would have been accountable.

On a motion for a new trial, the court concurred generally in the doctrine pronounced at the trial ; that the owner is not liable for goods clandestinely taken on board by the master, the former being present, and having the management of the voyage himself, leaving nothing to the master but the care of sailing and directing the ship, especially when the ship is not a freighting ship. But even under such circumstances, the court declared they would hold the owner liable, if he knew the goods were received on board upon freight. And the judge delivering the opinion of the court, concurs with the doctrine of *King v. Lenox*, that in such a case it is reasonable that the owner of goods who avails himself of the master's privilege, should be holden to trust to his individual responsibility.

In neither of these cases was the ship a general one. And *Abbott* thinks it makes no difference that the goods are taken as part of the master's privilege, because it is immaterial whether he is paid by a privilege or by wages.

The case under consideration is not like either of those cited. Here the ship was a general one. She was freighted by sundry persons. The cargo did not belong to the owner. The master, therefore, had authority to receive goods on freight, unless he was prohibited by the owner's presence.

I can see no error in the opinion of the judge who delivered the charge in the court below. He stated that the master of a vessel, when abroad, is the agent of the owners, and has power to make contracts in relation to freight, which are binding upon the owners. That when an owner is on board, and exclusively attending to the shipment of the cargo, he is not bound by the master's contract. But to relieve himself from liability, he must show the

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fact that he was exclusively attending to the shipment of the cargo. This doctrine seems to me to be supported by the authorities referred to, and is reasonable in itself. If the jury did not correctly apply the law to the facts of the case, the remedy is not by bill of exceptions and writ of error.

I am of opinion that the judgment of the court below should be affirmed.

Judgment affirmed.

JACKSON, *ex dem.* LEAH HENRY, *against* THOMPSON.

B. devised his real estate to his four children, in fee, in four separate parcels; and provided that if any of them should die without issue of their body or bodies, lawfully begotten, the share of the deceased should be equally divided between the survivors. Two having died with, and one without issue, leaving one surviving, *held*, that the latter took the whole of the deceased child's share in exclusion of the grandchildren of the testator.

EJECTMENT, for a lot of ground in *Oak Street*, in the 4th ward of the city of *New-York*, tried at the *New-York* circuit, on the 19th of *January*, 1826, before EDWARDS, C. Judge; when a verdict was taken for the plaintiff, subject to the opinion of the court.

The lessor of the plaintiff claimed under the will of *Elias Brevoort*, her father, deceased.

The facts are sufficiently stated in the opinion of the court.

For the plaintiff, to show that the will was duly proved, or receivable as an ancient will, were cited 3 *John. Rep.* 292; 3 *John. Cas.* 283; *Phil. Ev.* 349; *id.* 385, *note*; 4 *T. R.* 707. That the defendant's title deeds, referring to and reciting the will as the source of title, estopped him to question it, were cited 14 *John. Rep.* 224; 17 *id.* 161; 3 *John. Cas.* 174. That on the death of *John Brevoort*, the premises in question vested in the lessor of the plaintiff, as the sole surviving child of the deviser, were cited 16 *John. Rep.* 382; 2 *id.* 483; 2 *Cowen's*

Such a limitation is good by way of executory devise.

Proof by a subscribing witness that he, with two others, saw executed, and that they witnessed a will of land which he had seen in the surrogate's office, which was identified with the one produced on the trial; though the witness was too dim of sight to see it at the trial; *held*, sufficient proof of the will on a trial at law.

A will of lands, with a corresponding possession of 40 years under it, need not be proved by the subscribing witness. It is proper evidence as an ancient deed.

One claiming through deeds which recite a will, is estopped to question its genuineness.

*Rep.* 333; 3 *John. Rep.* 292; 11 *id.* 337. That the lessor's death, since the commencement of this suit, did not abate it, was cited 8 *John. Rep.* 495.

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*H. S. Mackay*, for the plaintiff.

*J. Dill*, contra.

*Curia, per SUTHERLAND, J.* The lessor of the plaintiff, *Leah Henry*, was the only surviving child of *Elias Brevoort*, when this suit was commenced. She has since died; but the defendant expressly waives all question as to the effect of her death upon this suit.

*Elias Brevoort* died prior to the 27th day of April, 1777, leaving four children; *Henry, John, Jacomentye* and *Leah*. By his will, he made a specific distribution of his real estate, in fee, among his children, in nearly equal proportions; and at the end of his will inserted this provision: "It is my mind and will, that if any of my children shall depart this life, without issue of their body, or bodies, lawfully begotten, that the share or portion of such, so departing this life, shall be equally divided, share and share alike, between the surviving ones." *Henry* and *Jacomentye* died leaving issue. *John* died in September, 1825, without children, leaving his sister, *Leah*, the lessor of the plaintiff, the sole survivor of the four children of her father, *Elias Brevoort*. As such survivor, she claims *John's* share of her father's estate under the clause in the will, which I have stated.

1. The will was properly admitted in evidence. Its execution was sufficiently proved by *Richardson*, one of the subscribing witnesses. He testified, positively and distinctly, to every fact necessary to show a valid execution of the will. His recollection, as to every circumstance was clear. Being more than ninety years of age, he could not see to read; and, therefore, could not testify upon the trial, to his signature as a witness. But he swore that he had seen the will in the surrogate's office; and that he then read and recognized his signature as genuine. As to the identity of the will produced on the

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trial, and that which the witness had seen in the surrogate's office, there was no dispute.

2. But the will required no proof by a subscribing witness. It was made in 1774; and the testator died prior to the 27th day of *April*, 1777; for, on that day, probate of the will was made before *Carey Ludlow*, the then surrogate of *New-York*; and, at the trial, possession was shown to have been in conformity to the will, from the death of the testator. Here, then, is a will and a corresponding possession, of more than 40 years. Under such circumstances, no proof by subscribing witnesses was necessary. (1 *Phillip's Ex.* 404, *Gould's ed.* 1823, note (a.) *Jackson v. Blanshan*, 3 *John.* 292. *Jackson v. Laroway*, 3 *John. Cas.* 283.)

3. The deeds under which the defendant claims the premises in question, refer to the will of *Elias Brevoort*, as the source of title. The defendant may, therefore, be considered as estopped from denying the genuineness and validity of the will. (17 *John.* 161. 14 *id.* 224.)

That *John's* share of his father's estate, upon the death of the former without issue, vested in the lessor of the plaintiff in fee simple, as the sole survivor of the four children of the testator, is clearly established by the cases which have given a construction to the will of *Medeef Eden*. (*Jackson ex dem. Eden v. Anderson*, 16 *John.* 382. *Lion v. Burtis*, 20 *id.* 483. *Wilkes v. Lion*, 2 *Coven*, 333.) The terms used are the same in both wills; and it is impossible to distinguish this case from those cited. The limitation over was good as an executory devise.

The grand-children of the testator, the children of *Henry* and *Jacomentye*, are not surviving children within the intention of the testator. (*Jackson v. Blanshan*, 3 *John.* 297, *per Spencer, J.* *Jackson v. Staats*, 11 *id.* 246.)

The plaintiff is entitled to judgment.

Judgment for the plaintiff.

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v.
Cumming.

CORLIES and WIDDIFIELD against CUMMING.

ASSUMPSIT, tried at the *New-York* circuit, *June 24th*, 1824, before EDWARDS, C. Judge.

At the trial, the following facts appeared: The plaintiffs, being commission merchants in *Philadelphia*, the defendant left with them in the autumn of 1820, and winter of 1820 and 1821, a quantity of cheese, to sell on commission. In *December*, 1820, the plaintiffs advanced to the defendant \$900 upon the cheese; for a balance of between 300 and 400 dollars, of which this action was brought. The plaintiffs made various sales of the cheese, and (among others) *March 9th*, 1821, sales to one *Kellogg*, on a credit of 90 days, to the amount of \$799,53. They, at the same time, sold him other cheese, belonging to another of their principals, one *Brown*, and took from *Kellogg* one note, payable to themselves, for both. After the sale, the plaintiffs changed the first note for two notes drawn by one *Dickson*, and endorsed by *Kellogg*, for part of the sum due to the defendant, and *Kellogg's* sole note for the residue. But all these notes were payable a few days earlier than the note given upon the sale. The testimony was somewhat doubtful as to the fact of the price for *Brown's* cheese being included in the first note. The judge charged the jury, that if they believed this to be the fact, they should find for the defendant; and they found for him accordingly, stating this to be the ground of their verdict.

Various other evidence was given, and questions raised upon the trial, and included in the case made by the plaintiffs; on which a motion was now made for a new trial. But, as the above, with those which are stated in

The sale of several parcels of goods by a factor, belonging to several of his principals respectively, on a credit, to one person, and taking one note from the vendee for the whole, payable to himself, will not, *per se*, render him liable to his principals. The note does not extinguish the demand, for goods sold, but leaves each principal to his usual remedy.

Nor will the factor's giving up the note, and taking others, payable earlier, or at the same time with the first, render him liable, provided he still retain the name of the vendee, either as maker or endorser.

A factor advancing money, and having goods in his hands,

is not confined in his remedy for his advances, to the mere fund deposited, but gives a joint credit to the fund and the person of his principal. Yet, from the nature of the contract, resort must first be had to the fund, if it can be made available.

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the opinion of the Court, are the only facts material to the law of the case, it is not necessary to give any others.

The principal points now argued, were, whether the defendant was entitled to his verdict on either of the grounds above stated, viz. the joining of the demand against *Kellogg*, in the same note with that against *Brown*, or the subsequent change of security.

Ketchum & Fessenden, for the plaintiffs, insisted that he was not; and that the plaintiffs' liability should stand on the ordinary question between factor and principal; that is, whether the factor has discharged his duty with becoming vigilance and fidelity, or whether he has been guilty of fraud or gross negligence. (3 *Caines*, 226. *Pal. on Ag.* 26. *M'Kinstry v. Pearsall*, 3 *John.* 319, 321. *Schenckhouse v. Gibbs*, 2 *Dall.* 136, note. 4 *Dall.* 136, *S. C.* *Goodenow v. Tyler*, 7 *Mass. Rep.* 36. 1 *Livermore on Agency*, 85. *Willes*, 400. *Favenc v. Bennett*, 11 *East*, 36. 5 *Com. Dig. Merchant*, p. 76, new ed. 15 *Ves.* 439. 2 *Bl. Com.* 405. 4 *Coven*, 205. 1 *Caines*, 43. 6 *John.* 69. *Russell v. Hankey*, 6 *T. R.* 12. 1 *Pick.* 343. *Burrill v. Phillips*, 1 *Gall. Rep.* 360.) That an action will lie, without first resorting to the fund pledged, they cited 1 *Str.* 919, and 1 *Gall. Rep.* 362, 3.

D. Lord, jun. contra. The plaintiffs cannot maintain this action, till they show that the fund has failed them without their fault. (17 *John.* 38.)

Blending in one security, the sales of the defendant's property, with those of another, made the plaintiffs accountable for the amount of the sale. By changing the securities, the plaintiffs made themselves accountable. These are rules of law. (*Toll. L. E.* 425, tit. *devastavit.* *Wall v. Buckley*, 2 *Ch. Rep.* 97. *Floyd v. Day*, 3 *Mass. Rep.* 403. *Wren v. Kirton*, 11 *Ves.* 377. *Massey v. Banner*, 1 *Jac. & Walk.* 241.) In *Jackson v. Baker*, (C. C. U. S. April, 1806, *M. S.*) a note of which, is furnished in *Whart. Penn. Dig. Agent*, 28, it was decided, that if a

factor sell on credit, and take a bond for the amount, blending with it another sum due to himself, the principal is not obliged to wait till the factor has recovered the money, but may sue the factor at once. (a)

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(a) The following note of this case, has been furnished to the counsel by the Hon. Richard Peters, and was produced on the argument of the principal case :

JACKSON }
v. } Circuit Court of the United States ;
BAKER. } Pennsylvania District, April, 1906.

The plaintiff consigned a number of boxes of hats to the defendant, to sell. The only question in dispute, was, as to one box, which the defendant sold on credit, for \$211 ; the amount of which, he included in a bond, taken to himself from the purchaser, for a much larger sum due to the defendant personally.

Hallowell, for the defendant, insisted that the plaintiff ought not to recover the \$211, as he had not yet received it from the person who purchased ; and, that his taking a bond for the amount, made no difference. (*Price v. Ralston*, 2 *Dall.* 60.)

The Court stopped Meredith, who was for the plaintiff ; and informed the jury, that the defendant ought either to have paid this money to the plaintiff, or enable him to look to the purchaser. But that he had not done the former, and had disabled himself from doing the latter. That the plaintiff could not have sued the purchaser, because the simple contract debt was extinguished by the bond ; and the defendant, having mixed the debt due to himself and to the plaintiff, in one bond, taken in his own name, that the plaintiff had no remedy on the bond ; and it does not appear that any offer was made to assign the bond. If the plaintiff cannot recover from the defendant now, when can he recover ? Sue him when he pleases, the defendant may keep him at arm's length, by saying, " I have not yet collected the money ;" whereas, the debt, having been originally due to the plaintiff, he might have sued for it, at any time, in his own name, if he had not been prevented by the conduct of the defendant, who, if he is the cause why the plaintiff cannot sue the real debtor, makes himself the debtor.

The jury found accordingly for the whole sum.

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v. }
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Rule for a new trial : 1st. Because the defendant was not answerable until he should have received the money. (2 *Dall.* 60.)

2. That *indebitatus assumpsit* for money had and received, will not lie in this case.

On the first point, I repeated what was stated in the charge to the ju-

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Curia, per WOODWORTH, J. The defendant deposited a quantity of cheese with the plaintiffs, as factors, upon which they made an advance of \$900. Whether the plaintiffs can sustain an action to recover back the advance, before any attempt is made to reimburse themselves by a sale, it is not material to decide. If it be admitted they can, the question arises, have they made themselves liable for the cheese sold? If they have, it becomes a subject of set off, which more than satisfies their claim.

As to the law on this point, I entirely concur in the principle laid down by Mr. Justice *Story*, in *Burrill v. Phillips*, (1 *Gall.* 360 ;) that the mere relation of principal and factor does not confine the rights of the latter to recover for advances, to the mere fund deposited; but that such advances are made on the joint credit of the fund and the person; to which I would add this qualification, that from the nature of the contract, resort must first be had to the fund, if it can be made available, before the principal is liable.

There does not appear to be any sufficient ground, from the evidence, for charging the plaintiffs with negligence, or the want of reasonable care and prudence in making the sale to *Kellogg*. The cause was fairly submitted to the jury; who by their verdict, have, in this respect, approved the plaintiff's conduct.

ry.* 2nd, That by the conduct of the defendant, in extinguishing the original debt, and destroying all privity between the plaintiff and the person to whom the goods were sold, he is to be considered as a receiver of that debt to the use of the plaintiff, as much so as if he had released the debt.

Rule discharged.

* The principal ground used on the argument for a new trial, was, that the plaintiff ought to have demanded the bond before he brought the suit. The court, in answer, observed, that if a bond had been taken for this debt, alone, the argument might have weight in it. But, as it was mixed with the defendant's money, such demand was unnecessary, because the plaintiff could not have compelled the defendant to deliver the evidence of a debt due to the defendant, though, in part, it contained money due to the plaintiff.

The judge, in his charge, submitted to the jury a question of fact, upon which he expressed an opinion, that if the plaintiffs did, in the first instance, include the amount of the defendant's cheese, with that of another person, in the same note, they ought to find for the defendant. They found for the defendant; and stated the ground of their verdict to be, that the plaintiffs took from *Kellogg*, one note, for the amount of the defendant's and *Brown's* cheese.

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On this statement two questions arise; 1. Whether the verdict is against the weight of evidence; 2. If it is not, whether the law was correctly laid down by the judge.

Before I consider these questions, I will dispose of that part of the case, in which it appears that, a considerable time after the sale to *Kellogg*, the plaintiff, for reasons not stated, changed the notes originally taken, and accepted in their stead, notes drawn by *Dickson* and endorsed by *Kellogg*; and one note drawn by the latter. These notes were all payable a few days before the expiration of the 90 days, the credit originally given to the purchaser. It is probable the exchange was made to improve the security. It might have been beneficial, but could not be prejudicial. Whether drawer or endorser, *Kellogg* was still holden. The time of payment was not extended; and the securities were equally available to the defendant, with that taken in the first instance. The plaintiffs did not, by this act, therefore, make themselves liable for the loss.

As to the question of fact, *Meade* testified, in answer to the sixth interrogatory, that the plaintiff sold to *Kellogg* a quantity of cheese belonging to one *Brown*, the amount of which was included in the same note with the defendant's; and that the plaintiffs guaranteed to *Brown* his share of the note. This witness was a clerk of the plaintiffs, at the time of sale; and so continued until 1823. He did not know what became of the note; nor did he recollect the date or amount; but he believed it had 90 days to run. As to this witness, it may be observed, that from his situation, correct information as to the man-

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ner of taking the note was to be expected. *Kellogg*, the purchaser, swears that he gave his note to the plaintiffs for a quantity of cheese, the amount a few cents short of \$800; that about the same time, and a little before, he purchased another parcel to upwards of \$800; and gave his note to the plaintiffs. That after the notes became due, and in the summer following, he made an exchange, by giving *Dickson's* note and his own note for a part, payable to a clerk of the plaintiffs, on demand. This evidence is certainly contradictory to *Meade's*. The jury have passed on their relative credibility. There is ground to question the accuracy of *Kellogg's* recollection. I think it evident he was mistaken in supposing he gave a note, on the exchange, to the plaintiffs' clerk, or that it was payable on demand. The notes exhibited to *Meade*, on his examination, were *Dickson's* notes to *Kellogg*, and *Kellogg's* note to the plaintiffs, each at 90 days. They correspond in amount with the sales, and are presumed to be the notes referred to. It is therefore apparent, that perfect reliance cannot be placed on *Kellogg's* recollection. The jury reposed more confidence in *Meade's* testimony. It was within their province. I cannot say that the verdict was not warranted by the evidence.


As to the next question, I am inclined to think the plaintiffs are not liable by reason of including the two demands in one note. A factor is not obliged to disclose to his purchaser the name of his principal, or that he sells as factor. He may, or may not take an instrument in writing as evidence of the debt. He may maintain an action in his own name for the price of the goods, and give a valid discharge. (*Cowp.* 255.) It is equally certain that the principal may come forward at any time before payment to the factor, and arrest his right. An action may be supported against the vendee in his, (the principal's) name. (*id.*) The factor has authority to sell on credit, for the period usual in the market, unless prohibited by his instructions; (6 *John.* 69;) and will not be responsible, if he appear to have acted with reasonable care and pru-

dence ; and has not been guilty of breach of orders, negligence, or fraud.

Now, then, can the fact, that a note was taken for two demands, be material, unless the principal has been injured by this ? If the factor had omitted to take any note, he would not, for that omission, be responsible. The sale in that case would have been charged in his books ; the principal might sustain an action on it in his own name, or give information to the purchaser, and forbid payment to the factor. All these rights remained after the note was given. It is well settled, that giving a promissory note for goods sold, is not a payment or extinguishment of the demand, unless such was the agreement of the parties. (5 *John. Rep.* 68.) The defendant, then, had, notwithstanding the note, a remedy against *Kellogg* by action. Why should the taking of a note which the factor might justifiably have omitted, be considered an act absolutely charging the factor ? All the remedy the principal had a right to claim, still remained. If it had appeared that the principal had demanded the note taken for his goods, and the factor had refused to assign it, or to allow the principal the benefit of it, that would present a different question. Then, indeed, the imprudence of having taken but one note for several demands, would be manifest, inasmuch as the factor thus put it out of his power to assign to each of his principals. By pursuing such a course, he incurred the risk of not being able to perform what his principals had a right to demand. Although not required to take a note in the first instance, yet having taken it, the principal would be entitled to the security, so as to enable him to pursue the course deemed advisable. But that case never occurred. *Kellogg* became insolvent. He was unable to pay any thing. Whether prosecuted on the note, or for goods sold, the result would be the same. The defendant never requested an assignment. The note was of no value. From the evidence, it is clear that the defendant has not sustained, nor was it possible that he could sustain, any injury by this act of the factor. He has never demanded the note or intimated a desire to obtain an assign-

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ment. He has not put the factor in default by a refusal. His claim rests singly on this; that the amount of the defendant's sales was included in one note with *Brown's* demand. I apprehend the principle contended for by the counsel for the defendant, cannot be supported, either on the ground of expediency, policy or justice. I am not aware that in a case like the present, it has ever been recognized.

In the case of *Goodenow v. Tyler*, (7 *Mass. Rep.* 36,) the factor took a note payable to himself. By the laws of *Massachusetts*, where a negotiable note is taken to secure the payment of money due by simple contract, it is merged in the note. Yet it was held that the factor was not answerable to his principal for the value of the goods; that although the remedy against the purchaser was changed, yet the relation between principal and factor, was not affected.

My opinion is, that, independent of usage, the plaintiffs did not, by taking the note, make themselves liable. A new trial must be granted, with costs to abide the event.

New trial granted.



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Harlow  
v.  
Humiston.

HARLOW against HUMISTON.

ON error from the *Washington C. P.*, where the cause was tried on appeal from a justice's court.

The action was case, by *Humiston* against *Harlow*, for a nuisance, in wrongfully placing logs and tree tops in the public highway, by means of which, the plaintiff's horse, being frightened, ran upon a tree top, and was killed.

On the trial, it appeared that the tree top was laid by the servant of the defendant below, during the defendant's sickness, and without his knowledge, in a place claimed by the plaintiff below to be in the public highway. It had, however, long been occupied by the defendant himself, as a place for laying his wood; and the supposed road ran through his land. The defendant below contended, that, though within the road fence, the tree top was not within the bounds of the public highway. Evidence was given upon this point, and as to the manner in which the injury

Where a bill of exceptions, taken in the C. P., stated the charge of the court upon points of law, and that the jury found a verdict, and that the party excepted, *held*, that the bill was sufficiently pointed to bring the charge in question, on error; and though, in the order of statement, the exception appeared to be subsequent to the verdict, yet *held*, that otherwise, the

it should be intended that the exception was taken at the proper time; judges, it is to be presumed, would not have signed it.

Though the statute, (2 R. L. 277,) requires public roads to be laid out four rods wide; and where they are laid out under the statute, they are to be deemed of that width; yet where they are claimed, not as being laid out under the statute, but by reason of a user for twenty years or more, they may be less than four rods wide.

And in trespass, for laying wood in a highway of the latter sort, by which the plaintiff's horse, being frightened, ran upon it and was killed, the road, in fact, being but 2 and 2 1-2 rods wide; and it being questionable on the evidence, whether the wood was laid within the road as established by use; though it lay within the road fence on the land of the defendant; *held*, that it should have been left to the jury to find whether the wood was in the highway.

All the land within a highway fence, is not necessarily subject to the right of way; and if not, it may be occupied by the owner. And if he place an obstruction there, and another be injured by it, he is not, therefore, liable.

And though such obstruction be within the highway, he is not liable, unless the person injured, exercise ordinary diligence to avoid it.

If a man's servant, in the ordinary course of his business, obstruct the highway, from which a traveller receives special injury, the master is liable.

The question seems to be, whether the act be such that he can justify himself to his master; if he may, it shall be deemed in the course of his business as a servant, and the master is liable.

Thus, where the master had been accustomed to lay his wood in a certain place for several years, and his servant laid the master's wood in the same place, while the latter was sick, and without his knowledge; *held*, that this was an act in the course of his business as a servant.

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to the horse was occasioned, while the plaintiff's servant was riding him ; but as the cause, here, turned on the question whether the charge given by the court below was correct in point of law, it is not necessary to notice the evidence, farther than it appears in the opinion of the court.

The court below charged the jury, that all the land not fenced in, was a public highway ; and if it had been ten rods wide, the defendant had no right to any part of it ; but had always been a trespasser upon the public, in laying his wood within the highway fence, though he had occupied the place for 38 years ; and it made no difference that the width was greater from the tree top than the ordinary width. They also charged, that though the defendant was sick, and knew nothing of the act of his servant in laying the tree top there, he was accountable.

The defendant below took exception to the charge ; and the bill of exceptions, after detailing the evidence and the charge of the court, concluded thus : The jury retired and returned, and delivered their verdict in favor of the plaintiff for fifty dollars damages ; to all which charge the counsel for the appellant (the defendant below) excepted.

Judgment for the plaintiff below.

*Z. R. Shipherd*, for the plaintiff in error, cited *Vin. Abr. Actions*, [*Nuisance*,] (*N. b.*) *pl. 4* ; *Blyth v. Topham*, (*Cro. Jac.* 158 ; ) *2 R. L.* 277 ; *Bac. Abr. Nuisances*, (*A.*) ; *2 Esp. N. P. Gould's ed.* 268 ; and *Butterfield v. Forrester*, (*11 East*, 60, 61.)

*B. Russell*, contra, insisted that the bill of exceptions was too general ; and therefore went for nothing. A party cannot except to a charge, without saying in what particular. He should specify his ground of objection. (*8 John.* 495. *20 id.* 357.) Beside, the exception was taken too late. On the face of the bill, it appears to have been after verdict. (*10 John.* 312.)

On the merits, he cited the statute, *sess. 40, ch. 43, s. 3* ; *17 John.* 280 ; *1 Cowen*, 78 ; *1 Stark.* 285 ; *Bac.*

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ligence in the defendant below? And this depends on the fact of the tree being in the road or not. The evidence, I think, shows it was not. The road appears to be but two and two and a half rods wide. Though the statute directs all roads thereafter laid out, to be four rods wide, yet it does not appear that this road was ever laid out under that statute. This is probably a public road, from having been so used for more than 20 years.

The court below should have charged the jury to enquire whether the tree lay in the highway. If so, then the plaintiff below was entitled to recover. But if it was not within the highway, the verdict should have been for the defendant below. Though it may have been an act of carelessness in him, to leave the tree so near the highway: yet, as the public have no right beyond the highway, whether enclosed or not; and as the defendant below had a right to use his land in any way not injurious to his neighbors or the public; and had used the place in question for a wood-yard, for near 40 years, he ought not to be responsible, though the plaintiff below may have unfortunately suffered.

If there was culpable negligence in this case, I consider the defendant below responsible. The master is accountable for the acts of his servant in and about his ordinary business. The servant, in this case, placed the wood where the defendant below, himself, had been accustomed to place his wood for near forty years. This was sufficient to justify the servant to the defendant below; and, in my judgment, sufficient to render the latter responsible, if the act itself was reprehensible. I am of opinion that the judgment be reversed, and a venire *de novo* awarded by the court below.

Judgment reversed.

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Tucker  
v.  
Ives.

**TUCKER against Ives.**

ON motion, by the defendant, to set aside the report of referees, which was in favor of the plaintiff. The facts are stated in the opinion of the court.

*W. H. Maynard*, for the motion.

*F. C. White* and *H. R. Storrs*, contra.

*Curia*, per SUTHERLAND, J. The application is founded principally upon the allegation, that the whole of the plaintiff's demand, amounting to between seven and eight hundred dollars, was barred by the statute of limitations; and ought not to have been allowed by the referees.

That demand originated as follows: on the 11th day of February, 1809, the defendant, *Ives*, sold and transferred to the plaintiff, a note made by one *George Stowbridge* to one *Oliver Tuttle*, for \$291. *Ives*, at the same time, agreed to be responsible to *Tucker* for the amount of the note, if *Stowbridge*, the maker, should fail to pay it. He, at the same time, gave *Tucker* a memorandum, stating the transfer of the note, and his agreement to be responsible for the amount; and it was also stipulated, that if the note should be sued, it should be in the name of *Tuttle*, the payee. *Tuttle* died; and *Ives*, the defendant, became his administrator. In August term of this court, 1810, *Tucker* recovered a judgment against *Stowbridge*, upon the note, in the name of *Ives*, as administrator; and issued a *ca. sa.* upon which *Stowbridge* was taken and imprisoned.

ney had and received; and that the claim was not barred by the statute of limitations.

Interest is not allowable on an unliquidated account for goods sold and delivered, where no time is fixed for payment; and there is no agreement to allow interest, express or implied.

As account, many items of which arose within six years before suit, is not barred by the statute of limitations as to those items which arose more than six years before suit. And this rule extends as well to the defendant's account, introduced by way of set off, as to the plaintiff's.

Where *I.* sold a note to *T.* and guaranteed the payment; the note to be sued in the name of the payee, one *O. T.*, who died, and *I.* became his administrator; and *T.* in *I.*'s name, sued on the note, obtained judgment against, and imprisoned the maker; and then *I.* compromised with him, taking notes with good sureties, and discharging him from imprisonment; and then *I.* received the money on the last notes; all which, except receiving the money, was more than six years before suit; but the money was received within 6 years; held, that *I.* was liable to *T.* as for money

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In *June*, 1811, while *Stowbridge* was still in custody on the *ca. sa.*, *Ives* made a compromise with him of this and other demands, amounting to about \$700; took his notes with good sureties for the amount, and discharged him from his imprisonment. Those notes were subsequently prosecuted by *Ives*, and the whole amount has been collected and received by him within six years before this suit was commenced.

The question is, whether enough of this money to cover the judgment obtained by *Tucker*, in the name of *Ives*, against *Stowbridge*, is not, in judgment of law, to be considered as received by *Ives* to the use of *Tucker*. The referees held that it was; and in this, I think, they were correct.

There is nothing in the case to show whether *Tucker* did or did not assent to the discharge of *Stowbridge*, and the new arrangement with him by *Ives*. But if it were necessary, in order to sustain a demand so obviously just, I think we should have a right to presume that *Ives* acted as the agent of *Tucker*, so far as his judgment was concerned; and that the security taken was, *pro tanto*, for his benefit, and taken with his knowledge and consent. If so, then *Tucker* had no cause of action against *Ives*, until he collected the money, or made himself responsible by some new promise, or some neglect of duty in enforcing the new securities obtained.

The fact that *Tucker* never enforced the guaranty of *Stowbridge's* note, given to *Ives*, strengthens the presumption that he assented to the arrangement made by *Ives*, and looked to the new security obtained, in the first instance.

Interest upon the judgment was properly allowed, from the time when it was obtained; although judgments did not carry interest until 1813. *Stowbridge*, who was examined as a witness, states, that he gave his notes with two sureties to *Ives*, for the whole amount of *Ives'* claim against him. Although the judgment did not carry interest, it was perfectly just and proper that *Stowbridge* should have paid

it ; and it is fairly to be presumed that it was claimed and allowed in the settlement.

The referees have obviously made a mistake in the amount of the receipt for the note of *Ambrose Cone*, of *August*, 1816. They read the receipt as for \$24,35; whereas, it is clearly shown that it was for \$74,35. There was no dispute as to this item, and the error originated in the obscurity of the writing. It would make a difference of \$50, with interest from 1816, in favor of the defendant, and would have entitled him to a report in his favor ; the report, as it now stands, being only \$44 in favor of the plaintiff.

But I think the referees erred in allowing the defendant interest upon a portion of the account exhibited by way of set off. If the orders mentioned in the account were for money, they would carry interest. But so far as the account consists of charges for goods, provisions and other articles sold to the plaintiff, I know no principle on which interest is allowable ; there never having been a liquidation of the account, and there being no evidence of an agreement, express or implied, to pay it. (3 *Coven*, 393. 4 *id.* 496.) No time of payment appears to have been fixed, and there is no evidence of the credit usually given at the defendant's store, (if he kept one, which does not affirmatively appear.)

Many items of the account being within six years, the whole account is thus taken out of the statute of limitations, and the defendant is entitled to the allowance of it, with the above exception in relation to interest.

On the whole, I think the report should be set aside, and the cause be again referred to the same referees.

Motion granted.

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THE PEOPLE OF THE STATE OF NEW-YORK *against* THE  
PRESIDENT, DIRECTORS AND COMPANY OF THE BANK  
OF NIAGARA.

Forms: Of in-  
formation in  
nature of a  
*quo warranto*  
against an in-  
corporated  
bank, for ex-  
ercising bank-  
ing privileges  
without war-  
rant;

Of plea, set-  
ting forth its  
act of incorpo-  
ration, and or-  
ganization un-  
der it;

Of three sev-  
eral replica-  
tions; 1. That  
on, &c. the  
debts due by  
the bank, over  
and above the  
amount of  
their specie  
deposits, ex-  
ceeded three  
times the sum  
of the capital  
stock sub-

scribed and paid in; *rejoinder and issue thereon*: 2. That they refused to redeem, &c. in specie, &c.; and yet not wholly discontinue their banking operations; *rejoinder and issue thereon*: 3. That they became insolvent, by the fraud, neglect, or mismanagement of them, or of some or all of their officers or agents; stopped payment, and discontinued and closed their banking operations, for several years. *Rejoinder* to the last replication, admitting its truth, but saying that the bank, on, &c. resumed payment, and continued it ever since that time. *Demurrer and joinder*.

*Held*, that the rejoinder was sufficient.

Under the act incorporating the bank of Niagara, (*sess.* 39, *ch.* 167,) the bank did not forfeit its charter by insolvency and closing their banking operations, if, before they were prosecuted by the people, they resumed the payment of their debts.

Otherwise, if the prosecution had been commenced before they resumed payment.

The statute, (*sess.* 48, *ch.* 325, *s.* 6,) passed April 21, 1825, limited such insolvency to one year. If it exceed that term, the bank forfeits its charter. But this act does not extend to cases of forfeiture happening before it passed.

An information in nature of a *quo warranto* against a corporation, for a forfeiture of its franchises, may be filed against it by its corporate name; may charge it generally with usurpation; and on the defendants' setting forth the act of incorporation, and justifying under it, the attorney general may reply the causes of forfeiture specially.

Such a replication is not a departure.

ON information in nature of a *quo warranto*. The pleadings were as follows:

*Albany county*, ss: Samuel A. Talcott, attorney general of the people of the state of New-York, who sues for the said people in this behalf, comes here before the justices of the people of the state of New-York, of the supreme court of judicature, of the same people, on the 8th day of March, 1825, in this same term of February; and for the said people, gives the said court here to understand and be informed, that *The President, Directors and Company of the Bank of Niagara*, at Buffalo, to wit, at Albany, in the county of Albany, for the space of six months now last past, and upwards, have used, and still do use, without any warrant, grant or charter, the following liberties, privileges and franchises, to wit: that of being a body politic and corporate in law, fact and name, by the name of *The President, Directors and Company of the Bank of Niagara*, and by the same name to plead and be impleaded, answered and be answered unto; and also the

following liberties, privileges and franchises, to wit, that of being, or becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may lawfully transact by virtue of their respective acts of incorporation; and also, that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks, and which they alone have a right to do; all which said liberties, privileges and franchises the *President, &c.* aforesaid, during all the time aforesaid, have usurped, and still do usurp upon the said people, to their great damage and prejudice; whereupon, the said attorney general prays the advice of the said court in the premises, and due process of law against the *President, Directors and Company of the Bank of Niagara*, aforesaid, in this behalf, to be made, to answer to the said people, by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid.

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And now at this day, &c. (*imparlance to August term, 1825, and appearance of the defendants, by T. Van Vechten & E. Baldwin, their attorneys.*)

And the said *President, Directors and Company of the Bank of Niagara*, having heard the said information read, complain, that, under color of the premises in the said information contained, they are greatly vexed and disquieted; and this by no means justly; because, protesting that the said information and the matters therein contained, are insufficient in law, and that they need not, nor are they obliged, by the law of the land, to answer thereto: yet, for plea in this behalf, the said *President, &c.* say, that by a certain act of the legislature of the people of this state, passed on the 17th day of *April, A. D. 1816*, entitled "*An act to incorporate the bank of Niagara*," they the said *President, &c.* were ordained, constituted and declared to be, from time to time, and until the 1st day of *January, A. D. 1832*, a body corporate and politic, in fact



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and in name, by the name of *The President, Directors and Company of the Bank of Niagara*; and by that name, it is enacted and declared, in and by the said act, that they, the said *President, &c.* and their successors, until the said 1st day of *January, A. D. 1832*, may, and shall have succession; and shall be, in law, persons capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions, suits, complaints, matters and causes whatsoever; as by the said act of the legislature of the people of the state of *New-York*, reference being thereunto had, will, among other things, more fully and at large appear. And the said *President, &c.* further say, that by the force of the said act of the legislature, and of the provisions thereof, they were created and constituted, and still continue to be, and are a body politic and corporate in fact and in name, and are entitled to do all lawful acts, and to have, use and enjoy all the rights, liberties, privileges, franchises and immunities granted to them, and conferred upon them, by the said act, and by the law of the land: by virtue whereof, they, the said *President, &c.* for all the time in the said information in that behalf mentioned, have used and exercised, and still do use and exercise, the liberties, privileges, and franchises of a body politic and corporate, in law, fact and name, by the name of *The President, Directors and Company of the Bank of Niagara*; and, by the same name, suing and being sued, pleading and being impleaded, defending and being defended, answering and being answered unto, in all courts and places whatsoever, and also the liberties, privileges and franchises of being and becoming proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may lawfully transact, by virtue of their respective acts of incorporation; and of actually issuing notes, receiving deposits, making discounts and carrying on banking operations, and other monied transactions which are usually performed by incorporated

banks. And the said *President, &c.* have claimed, used and enjoyed, and yet do claim to have, use and enjoy, all the liberties, privileges and franchises, allowed to, and conferred on them, in and by the aforesaid act of the said legislature, as it was and is lawful for them to do. Without this, that the said *President, &c.* during all, or any part of the time mentioned in said information, have usurped or do still usurp the said liberties, privileges and franchises, mentioned in the said information, or any of them, upon the said people of the state of *New-York*, in manner and form, as by the said information is above supposed; all which several matters and things, they, the said *President, &c.* are ready to verify, &c. Whereupon, they pray judgment, and that the aforesaid liberties, privileges and franchises, by them claimed in manner aforesaid, may be allowed and adjudged to them, the said *President, Directors and Company of the Bank of Niagara*; and that they may be dismissed and discharged by the court here, of and from the premises above charged upon them, &c.

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And the said *Samuel A. Talcott*, attorney general, having 1st replication. heard the said plea of the said *President, &c.* for the said people, &c. saith, that the said people ought not to be barred from having their aforesaid information against the said *President, &c.* because, he says, that the said *President, &c.* after their incorporation, did wilfully, or negligently, so transact and manage the affairs of the said corporation, that, afterwards, to wit, on the 1st day of *January*, 1818, the total amount of debts due by the said corporation, over and above the specie, then actually deposited in the bank, did exceed three times the sum of the capital stock, subscribed and actually paid into said bank; and this, &c.

And the said attorney general further saith, that the 2d replication. said people ought not to be barred, &c.; because, he says, that after the passing of the act of incorporation, in the plea of the said *President, &c.* mentioned, to wit, on the said 1st day of *July*, 1819, they, the said *President, &c.* did refuse, on demand being made at their banking house,

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during the regular hours of doing business, to redeem in specie, or other lawful money of the *United States*, the bills, notes and evidences of debt issued by the said *President, &c.*; and the said *President, &c.* did not thereupon wholly discontinue and close their banking operations, by way of discount and otherwise, until such time as the said *President, &c.* did resume the redemption of their bills, notes, and other evidences of debt; but on the contrary thereof, after such refusal to redeem their said bills, notes and other evidences of debt, and before they resumed the redemption thereof, to wit, on the 2d day of *July*, in the year aforesaid, and at divers other days and times, the said *President, &c.* did receive deposits, discount notes, and issue promissory notes of the said *President, &c.*; and this, &c.

3d replication.

And the said attorney general saith, that the said people ought not, &c.; because, he says, that after the passing of the said act of incorporation, in the said plea mentioned, and after the said *President, &c.* had entered upon the business of banking, to wit, on the 2d day of *July*, 1819, large amounts of the bills, notes and evidences of debt of the said *President, &c.* had been put into circulation by the said *President, &c.* and then were in circulation; and that while the said bills, notes and evidences of debt were in circulation, to wit, on the day and year last aforesaid, the said *President, &c.* by the fraud, neglect or mismanagement of them, or of some or all of their officers or agents, became wholly insolvent, and unable to redeem the said bills, notes and evidences of debt, so in circulation, in specie or other lawful money of the *United States*; whereupon, the said *President, &c.* to wit, on the day last aforesaid, discontinued, ceased and closed their banking operations, and from that time afterwards, to wit, until the 1st day of *October*, 1824, neglected to resume their banking operations, either by way of discount or otherwise; and this, &c.

Rejoinder to  
the 1st repli-  
cation.

And the said defendants, as to the said plea of the said *Samuel A. Talcott*, attorney general, first above pleaded, &c. in reply to the aforesaid plea of them, the said de-

defendants, protesting that the same replication, and the matters therein contained, are not sufficient in law, to convict them, the said defendants, of the premises in the said information above charged upon them, nor to remove them from the liberties, privileges and franchises aforesaid, and that they need not, nor are they bound by the law of the land, to answer thereto; yet, for a rejoinder in this behalf, the said defendants say, that they, the said *President, &c.* did not, after their incorporation, wilfully or negligently so transact and manage the affairs of the said corporation, that on the 1st day of *January*, 1818, or at any time before or after the said day, the total amount of debts due by the said corporation, over and above the specie then actually deposited in the bank, did exceed three times the sum of the capital stock subscribed and actually paid into said bank, in manner and form as the said attorney general hath, for the people, &c. above in his said replication, in that behalf alleged; and of this, they, the said defendants, put themselves upon the country, &c.

And the said defendants, as to the said plea, &c. secondly above pleaded, &c. in reply, &c. say, that the said people, &c. ought not, &c. because they say, that though true it is, that after the passing of the act of incorporation, in the plea of them, the said defendants, mentioned, to wit, on the day in the said replication mentioned, they, the said defendants, did refuse, on demand being made at their banking house, during the regular hours of doing business, to redeem in specie, or other lawful money of the *United States*, the bills, notes and evidences of debt issued by them, the said defendants, as in the said replication is alleged; yet the said defendants in fact say, that they did themselves wholly discontinue and close their banking operations, by way of discount and otherwise, until such time as they, the said defendants, did resume the redemption of their bills, notes and other evidences of debt, without this, that after such refusal to redeem their said bills, notes, and other evidences of debt, and before they resumed the redemption thereof, at the time mentioned in said replication in that behalf, or at other days or times, they,

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the said defendants, received deposits, discounted notes, and issued promissory notes of them the said *President, &c.* and of this, they the said defendants put themselves upon the country, &c.

And the said defendants as to the said plea, &c. thirdly above pleaded, &c. in reply, &c. (*protesting that it is insufficient in law, &c. and that they did not become insolvent as therein alleged;*) yet for a rejoinder, &c. the said defendants say, that though true it is, that after the passing of the said act of incorporation, in the said plea mentioned, and after they, the said defendants, had entered upon the business of banking, to wit, on the day mentioned in the said replication in that behalf, large amounts of the bills, notes and evidences of debt, of them, the said defendants, had been put into circulation by them, the said defendants, and then were in circulation, and that while the said bills, notes and evidences of debt were in circulation, to wit, on the day and year mentioned in the said replication in that behalf, they, the said defendants, became unable to redeem the said bills, notes and evidences of debt, so in circulation, in specie, or other lawful money of the *United States*; and that, thereupon, the said defendants, on the day in the said replication in that behalf mentioned, discontinued, ceased and closed their banking operations; and from that time, for a long time afterwards, to wit, until the day and year, in the said replication in that behalf mentioned, neglected to resume their banking operations, either by way of discount or otherwise, as in the said replication is alleged: yet the said defendants, in fact, say, that in and by the act of the legislature of the people of this state, in the plea of the defendants above mentioned, wherein and whereby they, the said defendants, were ordained, constituted and declared to be a body corporate and politic, in fact and in name, in the manner set forth in said plea, it was, among other things, enacted, that if, at any time after the passing of said act, the said *President, Directors and Company*, should refuse, on demand being made at their banking house, during the regular hours of doing business, to redeem in specie, or other lawful money of the *United*

*States*, their said bills, notes, or other evidences of debt issued by the said company, the said *President, Directors and Company* should, on pain of forfeiture of their charter, wholly discontinue and close their said banking operations, either by way of discount or otherwise, until such time as the said *President, Directors and Company* should resume the redemption of their bills, notes, or other evidences of debt, in specie or other lawful money of the *United States*, as by the said act of the legislature of the people of the state of *New-York*, reference being thereunto had, will, among other things, more fully and at large appear.

And the defendants aver, that at the time of their refusal to redeem in specie, or other lawful money of the *United States*, their said bills, notes and other evidences of debt, as herein before stated, and until the 28th day of *May, A. D. 1825*, they wholly discontinued and closed their said banking operations; and that on the said 28th day of *May, &c.* they resumed the redemption of their bills, notes or other evidences of debt, in specie or other lawful money of the *United States*; and have, ever since that time, and still do continue to redeem the same, in manner aforesaid; and this, they, the said defendants, are ready to verify, &c. wherefore, &c. (*as in the plea.*)

Issue to the country on the 1st and 2d rejoinders; and general demurrer to the 3d and last. The defendants joined in demurrer.

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*Talcott*, (attorney general) in support of the demurrer, made the following points: 1. The information is correctly brought against the defendants, by their corporate style, for the purpose of obtaining judgment of ouster, or of seisin of their franchise of being a corporation, for neglect or misuser. 2. *Non constat*, upon the information, that those who have assumed to act as such corporation under the name mentioned, ever were a corporation. 3. The information is good at all events, for the undue exercise of the other franchises enumerated, even if it should be deemed objectionable to bring it against the corporation by its cor-

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porate name, for usurping the franchise of being a corporation. And since there have been pleadings over, and a demurrer, if the information is, on the face of it, good for any part, it cannot now be objected to. It is like the case of a general demurrer to a whole declaration consisting of several counts, one count being good. 4. The replication sets forth sufficient causes of forfeiture; and by pleading over, if there are any defects in the replication, they are cured. 5. The rejoinder, as far as embraced by the demurrer, admits enough to forfeit the charter.

*A. Van Vechten*, contra, stated these points: 1. The information against the defendants as a corporation is bad; because it does not state any cause of forfeiture. 2. This defect cannot be supplied by the replication; but if it can, then, 3. The replication is bad for uncertainty.

He said, so far as the information seeks a forfeiture, and a fine for the usurpation, this proceeding is in the nature of a criminal prosecution. The plea is a direct answer. It sets forth the statute, and that the defendants organized a bank under it, which are admitted by the replication. This destroys the gravamen of the information. If so, what becomes of the charge that the defendants exercised banking operations, without warrant or authority? Has the attorney general a right to say, in his replication, for the first time, "though you had such warrant, you have forfeited it?" A forfeiture is not to be presumed; and it must be made a substantive ground of attack in the information. It must be expressly charged in the first instance. The defendants are not bound to set out their title, and negative a forfeiture, which has not been charged upon them. The information alleges a usurpation only. It is good for so much, and no more. This being met, the whole is answered. If it was intended to go for the forfeiture, the precise ground should have been stated, with time, place and circumstance. (*Commonwealth v. The Un. F. Ins. Co. in Newburyport*, 5 Mass. Rep. 230.) This case shows a plain distinction in the proceedings and judgment, between the two cases of usurpation and for-

feiture. In the former, there is a judgment of ouster, in the latter, of seizure. If there be a difference in the judgment, with what propriety can it be pretended there should be no distinction in the information? It is said that all may come out in the course of the pleadings. But suppose the defendants do not chose that this should be so: suppose they insist on having the true cause spread upon the information: have they not a right to do so? In *England*, the charters of incorporation are deemed mere private grants; and the attorney general is not presumed to know either of the grant or its extent. Not so of the corporation in question. It is created by a public act. Let the attorney general, then, state precisely the nature of the act which has produced a forfeiture. There being no such act stated, is the replication consistent with the information? No. It is a departure. The information admits the corporate existence of the defendants. The replication insists on a forfeiture. This order makes the latter the expositor of the charge, instead of the information. If it be insisted that the act of 1825, (*sess.* 48, *ch.* 325, *s.* 7,) gives a *scire facias*, or *quo warranto*, in this case; the answer is, it has not prescribed the form. This must be according to the common law. Did not the legislature mean that the attorney general should proceed for the forfeiture itself? And could it have intended that he may do this without saying so in the information? Suppose a default for want of a plea: could the attorney general have taken such a judgment upon this information as the statute directs? No. He could only have judgment of ouster for the usurpation.

As to the effect of pleading over, we deny usurpation; and then the attorney general comes and shows a case of forfeiture, to which we rejoin. We say this is a departure; which, it will not be denied, is matter of substance, and bad on general demurrer. And it follows, that it is bad after pleading over.

The replication is defective in itself, independent of the departure. It relies upon the fraud, &c. of the defend-

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ants, or their officers. Admit the fraud of the officers : the defendants do not admit their own fraud. The fraud, or other acts charged upon the officers, will not work a forfeiture. What these acts are, does not appear. No single act is pointed out. Still, the defendants may show it was not their own fraud.


There is a total want of certainty and precision. It is not stated whether there was fraud, or mismanagement, or neglect. The allegation is in the alternative. We certainly admit, by pleading over, no more than is alleged. It is not said whether the fraud was wilful and actual, or merely constructive. Which of these alternative particulars may be a ground of forfeiture, it is not said. It may be this, that or the other. It is also defective in not specifying the particular acts of violation or omission. To say fraud or mismanagement, is not enough. The cause of forfeiture does not consist in the sound, but in the act.

But the replication is answered by the rejoinder. The ground of forfeiture is the defendants continuing their operations after they ceased to redeem their bills, and before they resumed specie payments. In such a case, the act declares the forfeiture of the charter to be the consequence. This provision is, in substance, an express authority to resume their banking operations whenever they resume their payments. The object was, to prevent further issues of paper while they were unable to redeem it ; and it is always a good answer, that they have followed the directions of the act. If there be a limit to the time during which they may forbear business and forbear payment, who is to judge of it ? There is a period beyond which the charter cannot endure. But till that time arrive, the legislature have not only sanctioned, but they have enjoined a cessation of all banking operations under given circumstances. The general act of 1825, before cited, (section 6,) has limited the period to one year. If the court may judge of the time, where was the necessity of this legislative interference ?

At any rate, the legislature may do an act which amounts to a waiver of any forfeiture of this kind already incurred.

And have they not done so by passing a statute which declares there shall be a forfeiture by certain acts, after its passage ? They recognize all corporations as operative, and as not forfeited by any acts of omission or nonuser as to which there was no limitation of time before the act passed.

Indeed, is not the acquiescence of the state for this length of time without any prosecution, in itself, a sanction to the bank, in the resumption of their banking business ?

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*Talcott*, in reply. The replication does not depart from the information. The latter is not inconsistent with the former. True, we admit the corporation to have existed ; that it once had the privilege of banking. Neither the information nor replication deny this. But in the replication we follow out the subject, and allege a forfeiture. Having forfeited them, their exercise is the usurpation of which the information complains. Thus the case goes on according to the course of pleading in *quo warranto*. The information asks, by what authority do you exercise these privileges ? They say we should ask in a different form ; why do you *continue* to exercise them ? Where is the material difference ? The judgment follows the nature of the case as it appears upon the pleadings, whether there be a default or verdict. A default upon the information would have admitted the usurpation ; though not perhaps the reason and nature of it, so particularly as after it was explained by the replication. The statute of 1825 (section 7) is positive that the *corporation* shall be prosecuted by *sci. fa.* or information, &c. and that too in cases of forfeiture. This information follows the express provisions of the act. We cannot sue a corporation, unless by its corporate name. An action against the individuals would not be an action against the corporation. The objection that there is a departure, would apply to every proceeding by information in *England*. There is no difference in the mode of setting forth a usurpation, by pleading, whether it arise from the provisions of a private charter, or a public act of the legislature. In every case where the informa-

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tion was general, and the defendant justified, (and it is so in every English case,) the courts must have sustained the proceeding on grounds which are applicable here.

The authorities, however, are abundant, that the defects of the information, if there be any, are cured by the defendant's pleading over. (8 *John.* 110. *Cro. Car.* 288. *Frith's case*, *Cro. Eliz.* 68. 12 *Mod.* 459, 466, *per Holt*, *Ch. J.*)

True, the replication is in general terms; but it may be added, that the rejoinder admits all that is stated by it: thus presenting the question, whether a disability to pay arising from the fraud, mismanagement, or neglect of the corporation, or its agents, is a ground of forfeiture. It admits a case which never could arise from honest inability.

It is said the acts charged, may not be those of the whole company. I will not stop to inquire what the act of the company is, if it be not the act of their agent; nor whether the company would be liable, as such, on a note made by their agent. If the act of the agent is not to be considered cause of forfeiture, it is difficult to see how the charter can be forfeited, either by nonuser or misuser; cases provided for, both by common law, and by the statute of 1825. Where is the case in which the fraud, mismanagement, or neglect has been the act of all the individuals of a banking company? If this be necessary, when shall we find a case in which the charter can be forfeited? Wherever an agent acts within his powers, his is the act of the company; and may be treated as such to all intents and purposes; and this, whether it be in carrying on their business, or entirely desisting.

The company contend for allowing them time to lie by, in a dormant state. This, it is said, they have a right to, under the 10th section of the act of incorporation. (*Vid. sess.* 39, *ch.* 167, *s.* 10, 13.) But the 13th section contains the only provision for nonuser with impunity; and this restrains the right to the 1st of *January*, 1817. But what does the 10th section grant? That the defendants may lie still as long as they please? No such thing.

But if they do stop payment, they shall not issue paper before resuming payment, upon pain of forfeiture. The legislature say, "remain dormant as long as you dare, without resuming payments; and we leave the general law to take hold of you." That law declares nonuser to be a cause of forfeiture. The legislature add another cause to the list of misuser. Does it follow that they intend to sanction a misuser to an unlimited extent?

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The rejoinder denies insolvency; but admits a temporary inability to pay debts. What is this but insolvency? Whenever one becomes unable to pay his debts according to the ordinary course of business, he is insolvent. Here the defendants admit, in terms, that they were totally insolvent, for a long time. If the mere act of making payment is an answer, the defendants may defeat any proceeding against them by information or otherwise, very easily. All they have to do, is to pay a trifle at their counter; and plead it, either as a general bar, or *puis darrein continuance*, according to the time of the payment.

*Curia*, per SAVAGE, Chief Justice, (after stating the pleadings.) The first question respects the sufficiency of the information. Upon this, I shall only remark, that the form adopted here, is the same which was used in the celebrated case of the city of London, (3 Hargr. St. Tr. 545,) and which was there adjudged sufficient. A like precedent is given in *Rex v. Amery*, (2 T. R. 515.)

I am perfectly satisfied, therefore, with the form of the pleadings; and shall only examine the question presented by the demurrer, on the merits of the case; that is, whether the bank, having become insolvent and unable to redeem its paper, and having stopped business from the 2d of July, 1819, till the 1st of October, 1824, when it resumed the redemption of its bills, has, thereby, forfeited its charter.

I have not been able to find any adjudication which defines what nonuser shall amount to a forfeiture. Nor is it very important in this case, as it must be decided upon the statute granting the incorporation.

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The tenth section enacts, "that, if at any time after the passing of this act, the said *President, Directors and Company* shall refuse, on demand being made at their banking house, during the regular hours of doing business, to redeem in specie, or other lawful money of the *United States*, their said bills, notes, or other evidences of debt, issued by the said company, the said *President, Directors and Company* shall, on pain of forfeiture of their charter, wholly discontinue and close their said banking operations, either by way of discount or otherwise, until such time as the said *President, Directors and Company* shall resume the redemption of their bills, notes, or other evidences of debt, in specie or other lawful money of the *United States*. And in case the said *President, Directors and Company* shall, at any time hereafter, offend against either of the provisions of this act, it shall be the duty of the attorney general of this state, by information or otherwise, to prosecute the said company for such offence; and on conviction thereof, their charter shall be deemed void."

It seems the legislature anticipated the insolvency of this bank, and provided, that while insolvent, and unable to pay, it should cease doing business as a bank, until it should be able to redeem its paper, or, in other words, become solvent.● The bank did, as the legislature expected, become insolvent; and, according to its charter, stopped business until it became solvent again. At the commencement of this prosecution, it was solvent, doing ordinary business, and redeeming its bills. The legislature had not then declared how long the bank might suspend business. They have since, (*sess. 48 ch. 325, s. 6, April, 21, 1825,*) limited that indulgence to one year; but that act can have no effect in deciding this case.

It seems to me, that under the acts in force when this information was filed, it is a sufficient answer to say, that the bank is now doing business, and redeeming its bills; that it had a right, recognized by its charter, to suspend business, to become insolvent, or unable to pay; and that

if proceedings were not instituted against it till it became solvent, the right to prosecute for a forfeiture, had ceased.

Had the insolvency continued till the prosecution was commenced, the forfeiture would have been irremediable; but the defendants, having resumed the redemption of their bills, and thereby shown their solvency; and having, in the mean time, complied with their charter, by discontinuing banking operations, it is now too late to complain of an insolvency which no longer exists.

The defendants are entitled to judgment on the demurrer.

Judgment for the defendants.

N. B. WOODWORTH, J. did not give any opinion as to the effect of filing an information before the resumption of payment. And see the next case, where he delivers an opinion upon a similar replication, but does not recognize the doctrine, that filing an information would take away the right of the bank to resume payment. He there says, there must be something more than mere insolvency; that there must be a total nonuser to work a forfeiture. And he repeats and enforces the same proposition in the next case, *The People v. The Bank of Hudson*.

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THE PEOPLE OF THE STATE OF NEW-YORK against THE
PRESIDENT, DIRECTORS AND COMPANY OF THE BANK
OF WASHINGTON AND WARREN.

ON information in nature of a *quo warranto*. The pleadings were nearly the same in this, as in the preceding case of *The People v. The Bank of Niagara*, (ante, 196.) The information was filed in both cases at the same time; and the difference in the pleadings will appear by a summary of them given in the opinion of the court.

Insolvency and refusal to pay bills, &c. in specie or other lawful money, on demand, &c. are not, of themselves, within the act, (sess. 40, ch. 185.)

incorporating The President, Directors and Company of the Washington and Warren Bank, a ground for an information in nature of a *quo warranto*, or other proceeding, to oust them of their corporate rights.

To work such forfeiture, there must be a total nonuser. Per *Woodworth, J.*

The statute (sess. 48, ch. 325, s. 6.) passed April 1, 1825, is prospective in its operation as to the causes of forfeiture; but not exclusively so as to the remedy.

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Talcott, (attorney general,) in support of the demurrer, made the same points as in *The People v. The Bank of Niagara*; and also insisted on the special causes of demurrer mentioned by the court. He cited 5 *Mass. Rep.* 230; 12 *Mod.* 19; 19 *John.* 456; 4 *Mod.* 58; 2 *Show.* 278, 9; *Skin.* 310; *Com. Dig. Franchises*, (G. 3;) *Laws N. Y. sess.* 40, ch. 185, s. 5; 4 *John.* 457, 460; 1 *Phil. Ev.* 163, and cases there cited in the notes, ed. of 1820; 6 *T. R.* 265; 2 *Saund.* 291, a; and 2 *Kyd. on Corp.* 497.

B. F. Butler and *A. Spencer*, contra, cited 19 *John.* 349; *Laws N. Y. sess.* 40, ch. 185, s. 10; 1 *Hopk. Ch. Rep.* 354, 360; 5 *John. Ch. Rep.* 366; 19 *John.* 456, 474; 20 *John.* 404; 1 *Chit. Pl.* 586.

One question made by the defendants, in addition to those which were raised in *The People v. The Bank of Niagara*, was, whether the remedy should not have been by a *sci. fa.* instead of an information in nature of a *quo warranto*.

Curia, per WOODWORTH, J. This is an information filed by the attorney general, alleging that *The President, Directors and Company of the Bank of Washington and Warren*, without any warrant, grant or charter, have, for more than six months, used, and still do use, certain liberties, privileges and franchises, in the information set forth; and praying that process may be had against them, to answer by what warrant they claim to use and enjoy these privileges, &c.

The defendants plead, that on the 7th of *April*, 1817, by an act of the legislature, they were constituted a body politic, by the title mentioned in the information, to continue till *January* 1, 1832; that by the provisions of the act, they continue to be a body politic and corporate; and are entitled to use all the rights, privileges and franchises, allowed to them by the act; by virtue of which, for all the time in the information mentioned, they have used, and still do use, the liberties, privileges and franchises of being proprietors of a bank, for the purpose of issuing

notes, receiving deposits, making discounts, and transacting other business, which incorporated banks may lawfully transact, by virtue of their respective acts of incorporation; and also of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks; and claim the right conferred on them by the act to have and use all these privileges, &c.; concluding with a traverse.

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The plaintiffs replied, by separate replications, several distinct matters.

First, that the defendants did wilfully and negligently so transact the affairs of the corporation, that on the 1st of January, 1818, the total amount of debts due by the corporation, over and above the specie deposited in the bank, did exceed three times the sum of the capital stock subscribed and actually paid in.

Secondly, that the defendants refused, on demand, to redeem in specie, or other lawful money, the bills, notes and evidences of debt issued by them; and that they did not wholly discontinue and close their banking operations, until such time as they resumed the redemption of their bills, notes, and other evidences of debt; and before they resumed the redemption of them, they received deposits, discounted notes, and issued promissory notes.

On these replications, issues are joined to the country.

Thirdly, the plaintiffs reply, that after the defendants had entered on the business of banking, to wit, on the 2d of May, 1818, large amounts of their bills, notes, and other evidences of debt, had been put, and then were in circulation; and while so in circulation, by the fraud, neglect, or mismanagement of the defendants, or of some or all of their officers or agents, they became wholly insolvent, and unable to redeem their bills in specie or other lawful money; and on that day, discontinued, and closed their banking operations; and from that time, until the 1st of July, 1824, neglected to resume their business, by way of discount or otherwise.

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The defendants rejoin, admitting their inability to redeem their notes in circulation ; and that they discontinued and closed their banking operations, as alleged in the last replication ; and they then plead, that *they did not, by the fraud, neglect or mismanagement of the defendants, or of some, or all, or any of their officers or agents, become wholly insolvent, or unable to redeem their bills, &c. in circulation, in specie or other lawful money.*

To this rejoinder, the plaintiffs demur ; and assign for cause,

1. That it attempts to put in issue an immaterial question, to wit, whether they became insolvent by reason of the fraud, &c. set forth ; whereas, it is immaterial, whether the insolvency was occasioned by fraud or not.

2. Because the rejoinder is a negative pregnant ; as by averring that the insolvency was not by reason of such fraud, &c. it admits they did become insolvent, and unable to redeem, for some other reason.

The defendants join in demurrer.

It was stated on the argument, by the defendants' counsel, that no objection would be taken to the form of the information.

If the replication is good, independent of the causes which it assigns for the insolvency, the rejoinder is then bad, for the reasons given by the special causes of demurrer. If the allegation that the insolvency was occasioned by fraud, &c. is immaterial, the averment of the existence of such insolvency, and not the cause thereof, was what the defendants were bound to answer ; and on this ground the rejoinder is bad. If, however, it was material to allege in the replication, that the insolvency was produced by fraud, &c. then the rejoinder is good ; for it negatives material facts, to wit, the causes of insolvency ; and on this ground cannot be considered a negative pregnant, although it implies that the insolvency was owing to other causes.

The material question is, whether the replication be good in substance.

The act to prevent fraudulent bankruptcies, passed April 21, 1825, is prospective in its operation. Its effect,

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been sufficient cause for dissolving the corporation, had the 10th section in the act of incorporation been omitted. I entirely subscribe to the doctrine in *Slee v. Bloom*, (19 John. 456.) Suffering an act to be done which destroys the end and object for which a corporation is instituted, must be regarded as equivalent to a direct surrender. It cannot then answer the end of its institution, and is thereby dissolved. (4 Mod. 58. 12 Mod. 19. 4 Com. Dig. 272, *Franchises*, (G. 3.) In *Slee v. Bloom*, considerable stress is laid on the fact, that it was not pretended the corporation hoped or expected to resume its functions. In this case, the operations of the bank were discontinued for a time, and again commenced, before the filing of the information. Insolvency is admitted on the 2d of May, 1818 ; but it no where appears how long it continued. It does not necessarily follow that the insolvency continued six years, or even one year. Much would depend on the ability of the debtors to the bank. They might, on a particular day, be unable to take up their paper, or even be wholly insolvent ; and yet, within six months or a year, thereafter, retrieve their circumstances, and meet their engagements at the bank. Such an occurrence might restore the bank to solvency. I cannot, therefore, assent to the proposition, that insolvency merely, at a particular time, however produced, is good cause for dissolving the corporation. Its continuance must be such as to afford substantial ground to consider the object for which the institution was created, as defeated.

Waiving, however, the question, how long the insolvency must have continued to work a dissolution, the answer here is, that its continuance is not alleged. The refusal to pay, unless arising from continued insolvency, is, in my apprehension, no ground of forfeiture. The remedy of the creditors would seem to be by action. As to suspending operations, that may, in some cases, be a prudent and justifiable measure ; and consistent with the ultimate solvency of the bank. There must be a total non-user, to be a ground of forfeiture. For aught that appears,

this corporation may have continued to sue for debts, and elect their officers.

Whether an information is the proper remedy, it is unnecessary to inquire; the court being of opinion that no cause of forfeiture appears on these pleadings, and consequently that the defendants are entitled to judgment on the demurrer, for that cause.

Judgment for the defendants.

THE PEOPLE OF THE STATE OF NEW-YORK *against* THE
PRESIDENT, DIRECTORS AND COMPANY OF THE BANK
OF HUDSON.

ON information in nature of a *quo warranto*. The information was filed at the same time, and was in the same words, *mutatis mutandis*, as those in the two preceding cases of *The People v. The Bank of Niagara*, and *The Same v. The Bank of Washington & Warren*, (*ante*, 196, 211.) The particulars in which the subsequent pleadings differ, will be found stated in the opinion of the court, where a summary of all the pleadings is given, sufficiently full to render any statement of them here unnecessary.

It will be there seen, that the defendants demurred specially to one of the replications interposed by the attorney general.

The plaintiffs joined in demurrer.

C. *Bushnell*, in support of the demurrer.

Talcott, (attorney general) *contra*.

which destroys the end and object for which a corporation was instituted, is equivalent to a surrender of its corporate rights.

As where an incorporated bank becomes insolvent; and assigns so much of its property to trustees for the purpose of paying its debts, as to prevent its resumption of banking business.

And the attorney general may, on an information in nature of a *quo warranto*, reply such assignment in general terms; without saying in particular how much was assigned, or its value; or how much, or what value was necessary to disable the bank from resuming its operations.

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An information, in nature of a *quo warranto* against an incorporated company, seeking to deprive it of its franchises, on the ground of forfeiture by nonuser, &c. may be against the company in its corporate name.

The judgment is a judgment of seizure.

Corporate rights may be forfeited by nonuser or misuser.

Suffering an act to be done

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son.

Curia, per WOODWORTH, J. This is an information in nature of a *quo warranto*. The defendants plead, that by an act passed *March 25, 1808*, they were incorporated as a bank; which act was subsequently continued in force until the *1st Tuesday of June, 1832*; that by virtue of these acts, they are a body corporate, and entitled to do all lawful acts allowed by the statutes of incorporation; concluding with a traverse of the usurpation alleged in the information.

The plaintiffs reply, that on the *1st of August, 1819*, the debts of the corporation over and above the specie then actually deposited, exceeded three times the sum of the capital stock subscribed. On this, the defendants have taken issue to the country.

The plaintiffs reply, *secondly*, that on the *21st of August, 1819*, large amounts of bills, notes and evidences of debt of the defendants, had been put in circulation. And on the day last mentioned, the *defendants, by the fraud, neglect or mismanagement of them, or some, or all of their officers or agents, became wholly insolvent, and unable to redeem their bills, &c.*; whereupon the defendants discontinued their banking operations, either by way of discount or otherwise; and on the day and year last aforesaid, assigned and transferred so much of their property to trustees, in trust for the payment of their debts, as to *render themselves incapable of continuing their banking operations*, according to the intent of the statutes of incorporation.

To this replication, the defendants have demurred; and assign several special causes of demurrer.

It is objected, in the first place, that the information being against the defendants by their corporate name, is bad. To this it may be answered, the information is merely descriptive. It is not an affirmation that the defendants are a corporation; but that, by the name of *The President, Directors and Company of the Bank of Hudson*, or using that name, they have done the acts in the information alleged. And it then calls on them to answer, by what authority. Besides, the statute authorizes proceedings against the cor-

poration. The judgment must be against the corporate name. A corporation, created by the legislature, may lose its franchises by a misuser or a nonuser of them. They may be resumed by the government under a judgment upon a *quo warranto*, to ascertain and enforce the forfeiture. (9 *Cranch*, 51.) The judgment to be given is a judgment of seizure, which produces a dissolution of the corporation.

I perceive no substantial difficulties in the plaintiffs' way, as to form. The material question is, whether the replication is good in substance. For the reasons given in *The People v. The Bank of Washington & Warren*, I am of opinion that the mere fact of insolvency at a particular time, however produced, is insufficient. For aught that appears, if the pleadings go no farther, the bank may have subsequently become solvent. It ought to appear affirmatively that the insolvency continued; or if it did not continue, then that the defendants subsequently became solvent, and notwithstanding, ceased to exercise the franchises granted. So also with respect to the fact that the defendants ceased to exercise banking operations, for the time in the replication stated. Enough is not shown, in the statement of that fact, to warrant a judgment that the corporation is dissolved. We cannot say that the discontinuance was not justifiable. It may have been a prudent and necessary measure. The bank subsequently to August, 1819, may have become solvent. The state of the funds may have been so disposed as to be incapable of being realized; and not to have permitted the defendants with safety to resume their business. If, indeed, the suspension was the consequence of continued insolvency; or, afterwards on becoming solvent, if the defendants had still continued to suspend banking operations, I apprehend the right to dissolve the corporation would be established.

There is, however, another fact alleged, which, if well pleaded, will sustain the prosecution. It is this: that the defendants assigned and transferred so much of their property to trustees as to render themselves incapable of con-

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record in the office of the said surrogate, doth and may more fully appear. And whereas the said *Abner* and *Lydia*, having neglected and refused to perform the said order and decree, and to pay the sum thereby adjudged to the said plaintiff, and the said judgment, order and decree remaining in full force, not annulled or reversed in any way, the said plaintiff, for having execution of the said order, judgment and decree, afterwards, to wit, on the 8th day of *November*, A. D. 1824, sued and prosecuted out of the said court of the said surrogate, before the said surrogate, according to the form of the statute in such case made and provided, (a) a certain process or execution upon the said judgment and decree, against the said *Abner Bristol*, directed to the sheriff of the county of *Columbia*, by which said writ or process, the said sheriff was commanded to take the said *Abner Bristol*, if he should be found in his bailiwick, and him safely imprison, until he should perform the said sentence and decree, or until he should be delivered by due course of law. Which said writ, afterwards, and before the delivery to the said sheriff of the county of *Columbia*, aforesaid, to be executed as hereinafter mentioned, was duly endorsed, with a direction to the said sheriff, requiring him to receive 78 dollars and 64 cents, and interest, from the 9th of *November*, 1823, and 2 dollars and 13 cents, surrogate's fees of the said attachment or process, besides sheriff's fees, and which said writ or process, so endorsed as aforesaid, afterwards, to wit, on the 10th day of *November*, 1824, to wit, at *Hudson*, in the county aforesaid, was delivered to the said *Samuel E. Hudson*, who then was, and still is, sheriff of the county of *Columbia*, aforesaid, to be executed in due form of law. By virtue of which said writ or process, and of the said endorsement so made thereon as aforesaid, the said *Samuel E. Hudson*, so being sheriff of the county of *Columbia*, aforesaid, afterwards, to wit, on the 18th day of *December*, A. D. 1824, and within the bailiwick of the said sheriff of the county of *Columbia*, aforesaid, to wit, at *Hillsdale*, in the said county, took and arrested the said *Abner Bristol*, by his body,

Vid. stat.
36, ch. 79,
1, 12. 1
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and then and there, by virtue of the said process, and of the said endorsement so made thereon, as aforesaid, had and detained him in his custody for the said sum of 78 dollars and 64 cents, and interest from the 9th of *November*, 1823, and 2 dollars and 13 cents, surrogate's fees of the said attachment or process, besides sheriff's fees, so endorsed on the said writ or process, as aforesaid, and kept and detained him in his custody, from thence, until the said defendant, so being sheriff of the county of *Columbia*, as aforesaid, afterwards, to wit, on the said 18th day of *December*, A. D. 1824, at the city of *Hudson*, in the county aforesaid, without the leave or license, and against the will of the said plaintiff, voluntarily suffered and permitted the said *Abner Bristol* to escape and go at large. And the said *Abner Bristol* did then and there escape and go at large, wheresoever he would, out of the custody of him, the said defendant; he the said defendant, so then being sheriff of the county of *Columbia*, aforesaid; and the said sum of 78 dollars and 64 cents, with interest from the 9th of *November*, 1823, and the said sum of 2 dollars and 13 cents, surrogate's fees of the said process, so endorsed on the said writ or process as aforesaid, being then and still wholly unpaid and unsatisfied to the said plaintiff, to wit, at *Hillsdale*, in the county of *Columbia*, aforesaid, whereby," &c.

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The second count was substantially the same, except that it was for an *involuntary escape*. It set forth a certain judgment or decree, &c. as a certain *other* judgment or decree, but then dropped the word *other*, and referred to this judgment or decree, by the words *said*. It mentioned the execution as one upon the *said last mentioned judgment*, &c. and then referred to the execution by the word *said*.

General demurrer and joinder.

D. B. Tallmadge, in support of the demurrer, took five exceptions: 1. That the execution should have issued, both against administrator and administratrix.

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tinuing their banking operations. This fact, if conceded, presents a case falling within the general principle laid down in *Slee v. Bloom*, (19 John. 456;) *that the suffering an act to be done, which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to a direct surrender.*

But it is contended that this part of the replication presents a question of law, as to how much property must be assigned in order to incapacitate the defendants from continuing their banking business; and upon this the jury would have to pass, if issue were taken on the allegation thus stated.

The answer to the objection seems to be, that the plaintiffs are not presumed to know the exact amount of property assigned. It is a fact resting in the knowledge of the defendants. It was competent for them to rejoin that no assignment was made; or that the assignment did not exceed a certain specified amount: upon which issue might be taken.

We are of opinion that the plaintiffs are entitled to judgment on the demurrer; with leave to the defendants to withdraw the demurrer, and rejoin.

Judgment accordingly.

ry to give jurisdiction; and it may then say, *taliter processum fuit, &c.* Such summary proceedings are contrary to the course of the common law. The surrogate's court is entirely a creature of the statute. It should be shown to the court affirmatively, therefore, that the surrogate had power to make the decree; that the facts upon which he acted, gave him jurisdiction of the subject matter, and of the persons before him.

There is nothing in the last objection, that the counts of the declaration are repugnant.

The defendant is entitled to judgment on the demurrer, with leave to the plaintiff to amend on payment of costs.

Judgment for the defendant.

HALE *against* ANDRUS.

ASSUMPSIT on a parol promise of indemnity, tried at the Jefferson circuit, December 20th, 1825, before WILLIAMS, ^{H. and others became sureties for B., a deputy sheriff, to A., the sheriff; and then A. promised H., that if he would become surety for him, A., as sheriff, he would indemnify H. against his suretyship for B.—H. accordingly became surety for A.—A. was afterwards sued for B.'s wrongfully taking the goods of one, on a *fi. fa.* against another; and H. and his co-sureties for B., with A.'s knowledge, defended the suit, brought a writ of error, and reversed one judgment against A.; defended another suit against A. for the same cause; brought error; but the judgment was affirmed; and all this with A.'s knowledge; in which H. expended moneys in retaining an attorney and defending the suit, and prosecuting the writ of error; in an action by H. against A. on his promise of indemnity; *held*, that he might recover the moneys thus expended; for A.'s consent to the expenditure might, under the circumstances, be presumed.}

The declaration was, that, in consideration that H. would become surety for A., he (A.) would indemnify H. against being surety for B.; and averred that H. did become surety for A.; the proof was, that A. said to one witness, that he had agreed to indemnify H. in consideration of his becoming bail; and to another witness, and at another time, that in consideration that H. had become bail for him, he had agreed to indemnify H. as bail for B.; *held*, that the *first* admission supported the declaration; and though both witnesses were H.'s he might reject the second admission, and rely on the first; and that A. could not avail himself of his own admission to the second witness, to contradict the admission to the *first*.

To a declaration on promises of indemnity, the defendant pleaded a former recovery on the same promises; the plaintiff replied that the recovery was on other and different promises; and prayed judgment, because the defendant had not answered the promises thus newly assigned; the defendant rejoined non-assumpsit to the promises so newly assigned; and on the trial no record of the former recovery was produced; and objection was taken that the *onus* lay on the plaintiff, to avoid the plea by sustaining the replication; on verdict at the circuit for the plaintiff, subject to the opinion of the supreme court, on this, among other points, that court, being with the plaintiff on the other points, *held*, that the issue on this plea was informal, but amendable after verdict; that the replication admit-

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C. Judge; when a verdict was taken for the plaintiff subject to the opinion of this court.

The declaration contained two counts. The first count was, that on the 18th of *March*, 1816, the plaintiff, having, with others, become surety by bond to the defendant, then sheriff of *Jefferson* county, for one *Bealls*, his deputy; afterwards, on the 6th of *September*, 1817, the defendant, in consideration that the plaintiff would then become surety by bond for the defendant, as sheriff, promised the plaintiff to indemnify and save him harmless against all damages, &c. which he might pay or become liable to pay, in consequence of having executed the bond as surety for *Bealls*. That the plaintiff had paid, and become liable to pay large sums of money, specifying the particulars, to wit, that the defendant recovered judgment for the penalty of the bond given by the sureties of *Bealls*, in the supreme court, in *January* term, 1819, and certain damages were assessed thereon; and afterwards, in *May* term, 1823, recovered a judgment of damages for further and other breaches, against the sureties, by *sci. fa.* on the record of the first recovery, upon which last recovery by *sci. fa.*, the plaintiff paid \$250, including the costs of defending. And further, that one *Eliakim Barney*, in *October*, 1819, recovered judgment against the defendant in trover for a yoke of oxen, which *Bealls* had taken as deputy on a *fi. fa.*, which judgment was afterwards reversed on error, which action was defended, and writ of error prosecuted by the obligors in the bond of surety for *Bealls*. And a like action was prosecuted, and a like recovery had for the oxen,

ted the former recovery; that the *onus* of proving that the former and present cause of action were not the same, lay on the plaintiff; and that, unless the defendant would relinquish his plea, there should be a new trial to enable the plaintiff to give the requisite proof.

Held, also, the proper replication would be, that the former and present cause of action are not the same, and a direct issue to the country.

Non assumpsit infra sex annos to a declaration on a promise of indemnity, is bad in substance; and though issue be taken thereon, and there be a verdict found for the plaintiff subject to the opinion of the court; and the evidence be plainly against the plaintiff upon the issue; if the cause be in other respects with him, he shall have judgment; and although such an issue be found for the defendant, the plaintiff shall have judgment *non obstanti verdicto*.

Semble, that on a promise to indemnify, one action may be brought, and a recovery had for a breach or breaches; and then a subsequent action on the same promise for another breach or breaches, happening after the first recovery, &c.

in *December*, 1821, which, on error, was affirmed ; which action was defended, and a writ of error prosecuted by the obligors in the bond of surety for *Bealls* ; and on account of which actions and writs of error, the plaintiff had paid \$120.

The second count was substantially the same.

The declaration was entitled of *May* term, 1825.

The defendant pleaded 1. *non assumpsit* ; 2. *non assumpsit infra sex annos* ; 3. *non accrevit infra sex annos* ; to which 2d and 3d pleas the plaintiff replied, *assumpsit, et accrevit, infra sex annos* ; on which issue was joined.

The defendant pleaded, 4thly, that in the term of *January*, 1823, the plaintiff impleaded the defendant in this court for not performing the same identical promises and undertakings mentioned in the declaration ; and in *February* term, 1824, recovered judgment for \$1745,06 ; to which the plaintiff replied, that he brought the action pleaded, not for the non-performance of the promises and undertakings in the plea mentioned, but for the non-performance of other and different promises and undertakings, concluding with a verification ; and praying judgment, because the defendant had not answered the complaint of the plaintiff, as to the breach of the promises in the declaration mentioned ; and so newly assigned in the replication. To this the defendant rejoined ; that, as to the supposed promises newly assigned, he did not undertake and promise, &c. Upon this, issue was joined.

On the trial, the breaches mentioned in the declaration were proved ; and that the cause of action arose within six years before suit brought.

No proof was given touching the former recovery ; and the defendant objected that it lay with the plaintiff to establish his replication to the fourth plea, by proof.

The additional facts of the case, so far as they are material, will be found stated in the opinion of the court.

D. Tillinghast, for the plaintiff, argued the cause upon the following points, (among others) : 1. That the promise of indemnity was proved as laid in the declaration,

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(1 *Phil. Ev.* 163, 222, 3, *ed.* 1820. 14 *John.* 215. 15 *id.* 409. 11 *Hargr. St. Tr.* 261. *Com. Dig. Estoppel*, (A. 1.) 3 *Cowen*, 120. 4 *id.* 559.)

2. The statute of limitations is no bar. (2 *Chit. Pl.* 449, note (e.) *id.* 450, note (f.) 18 *John. Rep.* 14.)

3. The plea of a former recovery is no defence.

4. The plaintiff had sustained damages to the full amount of the verdict. (12 *John.* 207. 2 *Ld. Raym.* 1072. *Cro. Eliz.* 237. 4 *Cowen*, 417. 8 *John.* 249. 5 *John.* 168.)

5. The issue on the replication to the fourth plea, is, at most, informal; and cured after verdict.

A question was made on the argument, whether, admitting the plaintiff had once before recovered on the same promise now in question, though for former breaches, this recovery was not a bar to any further recovery for a breach or breaches subsequent to the former recovery. As to this,

Tillinghast said, the true test always is, whether the same evidence will support both actions. (*Kitchen v. Campbell*, 3 *Wils.* 308. *Rice v. King*, 7 *John. Rep.* 20. *Johnson v. Smith*, 8 *id.* 383.) Even though the plaintiff declare in both actions for the same cause, if he gave no evidence in the first, touching the ground of action in the second, it is not barred. (*Seddon v. Tutop*, 6 *T. R.* 607.) It is enough that the present demand has not been satisfied, and never submitted to the consideration of a jury. (*Snider v. Croy*, 2 *John. Rep.* 227.) Where the debt or duty is to arise from several acts to be performed at different times, each performance is a distinct duty, for which a separate action lies. (*Barker v. Sutton*, *Norfolk Ass.* 1662, *per Hale*, *Tr. per Pais*, 186. 1 *Esp. N. P. Gould's ed. pt. 1*, 247, *S. C.*) In *Swann's case*, (*Cro. Eliz.* 3,) it was said to be adjudged, that in covenants perpetual, if they be once broken, and an action of covenant brought, and a recovery upon it, if they be afterwards broken, a *scire facias* shall be had upon the judgment, and the party need not bring a new writ of covenant. This case clearly

recognizes a new remedy for every new breach ; and although a *sci. fa.* lies, at the election of the covenantee : this does not preclude a new action.

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Talcott, (attorney general) contra. Though the plea of *non assumpsit infra sex annos* may be defective ; yet it is true, and entitles us to judgment on the case.

The issue on the replication to the fourth plea, substantially presents the question, whether there had been a former recovery on the very promise now in question. The informality is not material after verdict. (1 *Chit. Pl.* 402, 507.) The plaintiff did not reply, as he might have done, that this is a suit for a subsequent cause of action upon the same promise. Had he done so, then I agree that the action would lie. But the new breach should have been replied distinctly. That is the only mode in which he can avail himself of it. It would not have been a departure. (14 *John.* 178.) The pleadings are conclusive, that both actions were on the same promise. At least, it lay with the plaintiff to show they were not.

The defendant is not liable for the costs of the case in which the plaintiff improperly brought a writ of error, and in which the judgment was, therefore, affirmed.

As to the variance, the contract consists both of consideration and promise. Both must be proved as laid. The declaration alleges an executory consideration. The consideration in proof is executed, and the variance is fatal to the plaintiff's action. (18 *John.* 455.)

Tillinghast, in reply, said, where a plea is bad in substance, the plaintiff may either demur or take issue ; and if the issue be found against him, he may then move for judgment *non obstante veredicto*. And though the court see, on a case made, that the plea of *non assumpsit infra sex annos* is true, they will not give effect to it.

The new breach of the old promise, on which the plaintiff had before recovered, created a distinct duty ; to perform which, the law would imply a new promise in the

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terms of the original engagement. This satisfies the replication, and falsifies the rejoinder. The case is like a single promise to pay by instalments. There each instalment is considered the subject of a separate promise; on which an action lies. The declaration may be simply on the promise to pay the last instalment, without any allusion to the first.

It will be intended in this case, that the damages in the first action were given for the breaches there in question, and for nothing more. The objection here goes, therefore, merely to the measure of damages. (*Miller v. Miller, Cro. Car. 241.*) In this view, there was no need of replying the new breaches.

Curia, per WOODWORTH, J. (after stating the pleadings.) The pleas of the statute of limitation are no bar. As to the plea of *non accrevit*, it appears from the evidence, that the *gravamen*, upon which the plaintiff relies to recover, is within six years. The plea of *non assumpsit infra sex annos*, does not apply to the case. The promise was made more than six years before suit brought; but it was a promise to indemnify against liabilities on the bond executed by the sureties of *Bealls*. The statute did not begin to run from the time of making the promise; but from the time damages were sustained. The plea, therefore, was bad in substance, and is not cured by the replication. The issue was immaterial, and interposes no obstacle in the plaintiff's way. If the issue had been found for the defendant, the result would have been the same. In that case, the plaintiff would be entitled to judgment, notwithstanding the verdict.

The issue joined on the fourth plea is informal; but is amendable after verdict. The question is, which party held the affirmative? It was undoubtedly the plaintiff. He alleges, that he brought the action for the non-performance of other, and different undertakings, on which the defendant takes issue. The recovery of the judgment set out in the plea, seems to be admitted. In the case of

Phillips v. Berick, (16 *John. Rep.* 136,) this question was considered. It was there held that the record of a former recovery, apparently for the same cause of action as that which is the foundation of the subsequent suit, is *prima facie* evidence only; and the plaintiff may repel it by showing that it was for a distinct demand. *Spencer, J.* observes, that "if the defendant had pleaded specially, he must have stated a former recovery for damages, by means of not performing the same identical promises. The replication would be, that the promises in that action were not the same identical promises. This would have formed an issue to the country; and the inquiry *in pais* would be, whether the former recovery included the demand then in contest; and the burthen of the proof would be thrown on the plaintiff."

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According to this rule, the defendant was entitled to a verdict on the issue upon the replication, as the plaintiff offered no evidence in support of it. It is more than probable, that this arose from misapprehension, as to the point whether he held the affirmative. Had it been deemed necessary, it may be presumed he would have attempted to support the issue. If the former recovery was not for this specific demand, it was easily susceptible of proof. Surprise, or inadvertence, may have been the cause that the plaintiff directed his attention exclusively to establish a good cause of action, without adverting to the effect of the defendant's plea. As the case, therefore, stands, the defendant will be entitled to judgment, although the plaintiff, in every other respect, may have shown a right to recover, unless the court award a new trial to enable him to supply the omission. As this seems to have been a fact really in controversy, the justice of the case requires, that after a trial on the merits, the plaintiff should be relieved, if, in other respects, his action is sustained.

I will, therefore, proceed to examine the only remaining question, which is, did the evidence support the declaration?

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Keyes, a witness for the plaintiff, testified, that the defendant admitted to him that he had agreed to indemnify the plaintiff, in consideration of his becoming bail for him as sheriff of *Jefferson* county.

Wardwell, another witness for the plaintiff, testified, that the defendant said, in consideration that *Hale* had become bail for him as sheriff, he had agreed to indemnify him on the bond he had given as bail for *Bealls*.

It will be observed, that the consideration stated in the declaration is executory, to wit, *if the plaintiff would become bail for the defendant*. Proof of a past consideration will not support the averment. The variance would be fatal. In the first, the performance of the consideration on the part of the plaintiff, constitutes a condition precedent. But a past consideration may be traversed; and cannot be enforced unless laid to have been done upon request; or, at least, it must appear that the party promising was under a moral obligation to do the act. (7 *John*. 87. 18 *John*. 455. 1 *Chit*. 297.) It is very clear, the defendant has a right to insist on the variance, if it exists; for the distinction between the two cases is well settled, and is material.

The only evidence of the agreement, is derived from the admissions to the two witnesses, *Keyes* and *Wardwell*, at different times. Whether the contract to indemnify was before or after the plaintiff became bail for the defendant, does not distinctly appear. The expressions, as stated by *Wardwell*, seem to imply that the bond had been given before the promise was made; and yet, as the defendant was not speaking with an eye to what form of words might render him liable, it may have been intended to state merely, that the consideration to become bail, was the promise to indemnify. It is more probable, that the promise was the inducement to become security, than that subsequently, as a distinct transaction, the defendant should gratuitously make a promise to indemnify. The one is a very natural proceeding; the other, out of the ordinary course. If, then, from the evidence, we are to draw an inference as to the time this contract was made, I in-

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dine to think the conclusion warranted, that the contract was executory.

But admitting *Wardwell's* testimony varies from the declaration ; the only effect is, that the plaintiff must resort to other proof, or fail. Although it does not support the declaration as framed, it cannot be used as evidence that the contract was different. The defendant cannot avail himself of his own admissions.

The evidence of *Keyes* places this fact beyond reasonable doubt. If his testimony, singly, makes out the plaintiff's case, it cannot be impaired by a different confession of the defendant, to another witness, and at another time. When the defendant says, that he had agreed to indemnify in consideration of the plaintiff's becoming bail, I understand him as saying, that he was to indemnify, if the plaintiff became his surety. He does not speak in the past tense. It evidently implies that one was the consideration of the other. In my opinion, the witness substantially supports the consideration as laid in the declaration.

The damages found are \$150,87. There can be no good objection to the claim of one third of the execution levied on the plaintiff's property ; nor for one third of the costs for which the plaintiff gave a note to his attorney. If the plaintiff had not defended the suits commenced by *Barney* against the defendant, for the default of *Bealls*, the defendant might have defended, and claimed his costs on the bond. As the plaintiff would have been ultimately liable, and as the defence by the bail was with the knowledge of the defendant, under the circumstances, his assent may be presumed. These two items amount to the verdict.

The result of my opinion is, that a new trial be granted, with costs to abide the event, unless the defendant, within 20 days, shall deliver to the plaintiff's attorney, a waiver in writing, of the benefit of his fourth plea ; and if such waiver shall be delivered, then, that judgment be entered for the plaintiff.

Rule accordingly.

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BOWMAN *against* RUSS and COLTON.

TRESPASS. The declaration contained four counts. The first was of *trespas quare domum fregit, et de bonis*, &c. ; the second of *trespas quare clausum fregit, et de bonis*, &c. ; the third of *trespas quare clausum fregit* ; and the fourth of *trespas de bonis asportatis*.

To the first count, the defendants pleaded, in justification of breaking and entering the house, and taking and carrying away the goods, that long before, and at, and after the time when, &c. they were overseers of the poor of the town of *York*, in the county of *Livingston* ; and as such overseers, before the time when, &c. to wit, on the 7th day of *July*, 1823, made application to *Paul Goddard* and *Apollos Long*, esquires, two of the justices of the peace of the county of *Livingston*, under and by virtue of the 22d section of the act for the relief and settlement of the poor, setting forth, that the plaintiff had absented himself from his wife and children, and left them a charge to the town of *York*, and was possessed of real and personal estate lying and being in the county of *Livingston*, which justices afterwards, and before the time when, &c. to wit, on the 7th day of *July*, 1823, upon due proof of the facts in the application set forth, issued their warrant under their hands and seals, directed to the overseers of the poor of the town of *York*, commanding them to take and seize the goods and chattels of the plaintiff, and to let out and receive the annual rents and profits of the lands and tenements of the plaintiff in the county of *Livingston*, for and towards the maintaining, bringing up and providing for his wife and children, so left a charge, &c. ; whereupon the defendants, as such overseers, by virtue of the warrant, &c. peaceably and quietly entered, &c. and seized and took, &c. as they lawfully might, &c. ; and that afterwards.

This is necessary to give the justices jurisdiction, and it may be traversed by the replication. A party is not estopped by the proceedings and judgment of a court of inferior jurisdiction, to question its jurisdiction ; and enough must be stated by the party who would avail himself of such proceedings and judgment, to show that it had jurisdiction.

wards, to wit, at the then next term of the general sessions of the peace of the county of *Livingston*, to wit, at, &c. they made application to that court, for the confirmation of the seizure, &c.; that the court, by consent of both parties, postponed the hearing till their next *January* term, when, after hearing the proofs and allegations of the parties, they ordered and adjudged that the seizure should be, in all things, confirmed; which are the same trespasses, &c.

The pleas to the second and fourth counts, were substantially the same.

To the third count, the defendants pleaded severally, *liberum tenementum*.

The plaintiff replied to the pleas to the 1st, 2d, and 4th counts, that at the several times when, &c. in those counts mentioned, he had not left his wife and children, or any or either of them, a charge to the town of *York*; nor had his wife, or any or either of his children, at any time previous to the several times when, &c. been a charge to the town of *York*; but on the contrary, ever and until, and at and after the several times, when, &c. he did continue to provide them with an abundant supply of every necessary for their support and maintenance, wherefore, &c.

To the pleas to the third count, the plaintiff new assigned, more particularly describing the *locus in quo*; and the defendants justified, as in their pleas in the 1st, 2d and 4th counts.

The defendants demurred to the plaintiff's replication to the pleas to the 1st, 2d, and 4th counts, and the plaintiff joined in demurrer.

The plaintiff demurred to the rejoinder of the defendants, and the latter joined in demurrer.

Hastings, for the defendants. The plaintiff is concluded by the proceedings before the justices; and the subsequent confirmation by the sessions. The justices acted judicially. This was holden of a justice who acts under the 16th section of the act in question, (1 R. L. 284,) in

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*Adams v. Oaks*, (20 John. 282,) which section confers the power in substantially the same words as the 22d section, (1 R. L. 286, 7.) Being a judicial act, the plaintiff is concluded from questioning it in this collateral way, until reversed. The decision of the justices, and the confirmation of the court of sessions, are conclusive on the plaintiff, as well in relation to jurisdiction, as in all other respects. He appeared before the sessions, and litigated the questions in the cause, one of which was, whether the court had jurisdiction. The question on the merits was, whether he had deserted his family. This has been tried, and determined against him. He is estopped to question the fact in this form.

*F. Tracy*, contra. The pleas are clearly bad, for not averring the fact, that at the time of issuing the warrant, *Bowman* had left his family a charge to the town of *York*. This fact was necessary to give the justices jurisdiction; and must, therefore, be pleaded, and may be tried as a matter *in pais*. The authorities are full to this point. (*Adkins v. Brewer*, 3 Cowen, 206. *M'Chung v. Ross*, 5 Wheat. 116. *Morgan v. Dyer*, 10 John. 161. *Mills v. Martin*, 19 id. 33. *Borden v. Fitch*, 15 id. 141. *Perkins v. Proctor*, 2 Wils. 382.)

*Curia*, per SAVAGE, Ch. Justice. The question is, whether the warrant of two justices to seize the property of a man for leaving his wife and children a charge upon the town, is a good justification in an action of trespass, where it is admitted upon the record, that he had not left his wife and children such charge.

In pleading the proceedings of an inferior court, it is necessary to state sufficient to give jurisdiction to the court, and then the plea may say, *such proceedings were had*, &c.; but here, it is not averred that the plaintiff had absented himself, &c.; the very fact upon which alone the justices had power to proceed. According to the point insisted on by the defendants, the justices may proceed against any man, and take from his own possession the ve-

ry property with which he is contributing to the support of his family.

In the case of *Frery v. Dakin*, (7 John. Rep. 75,) the plea of an insolvent discharge was held ill, because it did not state that three fourths of the creditors had signed the petition, which was necessary to give jurisdiction. In *Morgan v. Dyer*, (10 John 161.) the plea omitted to state that the defendant had been an inhabitant of the county for three months before presenting the petition, or was in prison; one of which is necessary to give jurisdiction under the act of 1811; and the plea was held ill for that reason. In *Wyman v. Mitchell*, (1 Cowen, 316,) it was not stated in the plea, that the defendant was an inhabitant of the county when he made his application; although it stated that, at, &c. within the county, he was an insolvent debtor within the meaning of the act, yet, being an inhabitant was necessary to give jurisdiction, and the plea was held ill.

According to these decisions, the pleas in question are clearly bad. Suppose the plea in *Wyman v. Mitchell*, had not been demurred to; but the plaintiff had replied that the defendant, when he applied to the first judge of Albany, was not an inhabitant of the county; surely that fact admitted, would put an end to all pretence that the discharge was valid. So here, as to the pleas to the first, second and fourth counts, the fact being admitted, that when these proceedings were had against the plaintiff, he had not been guilty of the misconduct which alone gives to the justices power to proceed against him, it clearly follows that their proceedings were *coram non judice*, and void.

If I am right, judgment must be given for the plaintiff on both demurrers. The justifications are all defective in themselves.

Judgment for the plaintiff.

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THE PRESIDENT, DIRECTORS AND COMPANY OF THE  
BANK OF UTICA against CHILDS.

Where a note was endorsed by the holders, to a bank for collection; whose notary negligently omitted to charge a prior endorser by giving notice of non-payment; and the bank was sued by their endorsers for neglect, and compelled to pay damages; in an action of assumpsit against the notary; *held*, that the cause of action arose immediately on the omission; and the bank, not having sued till more than 6 years after, were barred by the statute of limitations.

And this, though the former suit, and recovery thereon against, and payment of damages by the bank to the holders, were all within six years of the suit against the notary.

*Held*, also, that the notary not having notice of the former suit, could, in no way be affected by it, even as to the amount of damages.

*Semble*, it would be otherwise as to the mere amount of damages, if he had had notice; but still that he must have been sued within 6 years from his omission.

ON demurrer to the plaintiffs' replication. The first count of the declaration stated, that on the 14th of *February*, 1818, and for a long time before and after, the defendant was a public notary of this state, &c.; and in consideration of certain reasonable fees and reward, to be paid to him by the plaintiffs, he then undertook and promised to give due notice to *John C. Spencer*, of the non-payment of a certain promissory note, dated *August 12th*, 1817, payable to *Spencer*, or order, 6 months after date, for \$1237, with interest, at the *Utica Branch Bank*; endorsed by *Spencer* to *Smedes & Canfield*; and left at the plaintiffs' banking house there for collection, by the holders, (*S. & C.*) on the 10th of *February*, 1818; and which was not paid when due, on the 14th of *February*, 1818. Yet the defendant did not give notice of the non-payment, nor cause it to be given to *Spencer*; by reason whereof, the plaintiffs had been compelled to pay the holders the amount of the note with interest, and costs of prosecuting and defending a suit in this court, and in the court for the correction of errors.

The 2d count was in substance the same.

The defendant pleaded, *3dly*, not guilty of all or any of the grievances alleged within 6 years, next before the commencement of the suit.

The plaintiffs replied, that within six years next before this suit was commenced, and on the 1st of *January*, 1821, the holders sued the present plaintiffs at law, for the neglect of giving notice as alleged in the declaration, which suit the present plaintiffs defended; that in *January* term, 1823, the holders recovered judgment for \$1804,37, which was affirmed by the court for the correction of errors in

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1824; and that on the 20th day of May, 1824, the plaintiffs paid the holders \$2206,92, in full of the judgment so affirmed.

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General demurrer and joinder.

*S. A. Foot*, in support of the demurrer. The *gravamen* rests on the negligence of the defendant; not the recovery against the plaintiffs. The history of that recovery will be found in 20 *John*. 372, and 3 *Cowen*, 662. The replication avers the recovery as a consequence of the negligence; for which negligence an action on the case is brought. The grievance alleged, is the omission to give notice to *Spencer*. This omission is the ground of the action; and the statute, as pleaded, relates to the time of the omission. The answer given by the replication is, "we have been obliged to pay money by reason of the negligence, a long time after it happened; and therefore you are guilty within six years." Is not this a very illogical conclusion? Suppose the holders had not prosecuted the bank within 10 years, and the bank had omitted to interpose the statute of limitations; would *Childs* be liable over? Shall he be put in the power of the bank in this way, they paying when they please, and then calling on him? The bank would be under no obligation to plead the statute. (3 *Cowen*, 330, 1, &c.) Suppose deceit in the sale of a horse; but the defect concealed does not show itself till six years after the sale. No damage results till that time. Could this be replied in answer to the statute, pleaded to an action brought after the 6 years? So of a warranty, and a suit against the last vendor, who is thrown in damages, and then sues his vendor, more than six years from the sale to him, but a few days after he has paid the money. Would it be competent to reply the recovery? The answer that he did not before know of the defect, would not avail the vendee in either the case of the deceit or warranty. (*Troup v. Smith's Exrs.* 20 *John*. 33.) The fraud or breach of warranty was consummate at the sale. (*Oothout v. Thompson*, 20 *John*. 279.) The turn of reasoning in the last case goes to illustrate what we contend

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for; that a distinction should be kept up between torts and their consequences; that it is the act which must control, and not the consequences which flow from it. In both the cases cited, the actual damages arose within six years of the action; yet this was not made a point.

The bank had an immediate cause of action on the omission taking place. If so, the statute began to run immediately. (12 *Mod.* 111. 1 *Sid.* 95. *T. Raym.* 61.) A liability to pay damages, was enough to sustain the suit. As between the plaintiffs and defendant, the former were the holders of the note. Suppose a clerk of a county omits to record a deed, by which a title is defeated, must the party injured wait till eviction, before he can sue for damages; thus running the risk of the death of witnesses and other losses of testimony? The right of action dates from the wrong committed. (*Read v. Markle*, 3 *John. Rep.* 523.) This is so of a misfeasance; (*Com. Dig. Pleader*, (2 *O.*) *Cro. Jac.* 255;) and the same reason applies to a non-feasance. In *Godin v. Ferris*, (2 *H. Bl.* 14,) it was held that custom-house officers must be sued within the three months' limitation, after actual seizure of goods; though a question upon the condemnation had been, during the whole time, in the exchequer, on a suit there, which was pending at the expiration of the three months. (*Saunders v. Saunders*, 2 *East*, 254, *S. P.*)

The former suits cannot affect the defendant. He was not a party to them, nor does it appear that he had notice.

J. Platt, contra. When was the right of action complete? Against torts, which, *per se*, give a right of action, as trespass, trover, and slander by words actionable without special damages, we concede that the statute begins to run immediately, on the wrong being committed. But where the injury is consequential, and where the action does not lie immediately, the statute runs only from the time of the injury being complete. This cannot be said till the consequences are unfolded. There must be *damnum et injuria*. In this case, the neglect was *damnum*; but there was no *injuria*, till the damages fell upon the

plaintiffs. Till this happened, it was entirely contingent whether they would ever sustain any damage. The note might have been recovered of the makers. The endorser might have been indemnified; and thus notice out of the question; and he might consequently have been reached in a court of equity. The plaintiffs might have obtained the money in a variety of ways; or the holders might have sued *Childs* directly, as the sub-agent. By a suit, they might have made him their immediate agent, adopted his acts, and thus have recovered against him. The action upon this very note, reported in 20 *John*. 372, and 3 *Cowen*, 662, regards the relation between them in this light. Where the holders might go, was uncertain. If the bank had paid the money in advance, this would have been in their own wrong, and a good defence to *Childs*. But the payment was by compulsion in its most rigid form. The claim was litigated to the last, and ended in a court of dernier resort.

As to the class of torts which become actionable by reason of consequential damages, the plea of the statute must always say *non accrevit*. (3 *Burr*. 1281. *Bac. Abr. Limitation of Actions*, (D) pl. 3. 2 *Salk*. 421, 2. 1 *Saund*. 38, note (2). 2 *id.* 63, note (6).) The commencement of a suit against the plaintiffs, and driving them to incur expenses, was the point of time when the cause of action arose in this case. They were not damnified till the suit was brought against them.

[SUTHERLAND, J. Suppose a potion unskillfully administered by a physician, from which the patient sustains damages.]

Platt. If it was a slow poison, and not operative till a year after, the action would not lie till that time. Suppose it administered to your honor's servant, and the consequences are not felt by you till after the year; you could not maintain your action before that time.

Childs served as a deputy of the plaintiffs, and was bound to indemnify them, the same as a deputy sheriff is

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his principal, the sheriff. A promise of indemnity is implied from *Childs'* relation to the bank. If so, then *non damnificatus* would be a proper plea to this action. It is the same case as a covenant of simple indemnity. In the case supposed of a clerk's omitting to register a deed, I deny that the statute would begin to run at the time of the omission, or from the time of an eviction; but from the intermediate time, whenever the party can show that he has lost his right. The omission may, or may not prove injurious. The loss is potential, contingent. In this case, the holders had a right to sue immediately; but not so with us. We were obliged to wait till we saw where they would go. As I have shown in the case of the physician, there is a difference between the right of the servant and the right of the master. As to the former, the action may be brought instantly. As to the latter, not till the consequences are felt by the master. In the case of the former, the act may be injurious *per se*; in the latter, only by consequence. Suppose a stage driver carelessly overturns the coach, and breaks a man's arm; the latter has his election either to sue the driver, or the proprietors of the line; but he omits to sue at all for three years: clearly the owners could have no action over, for they have no claim against the driver for breaking the arm, till damages are recovered of them, or, at any rate, till they are sued and put to expense. So here, *Childs*, the servant, was the immediate instrument of the injury; and is answerable on the same terms. Suppose seven years ago, one dug a pit in the high-way; and five years after, a traveller falls into it, and breaks his leg: clearly he could not sue till the consequential injury happen; and till then there is no right of action on which the statute can operate. The misfeasance was complete five years before; but the consequences are not felt till five years after; and from this time the statute begins to run.

We admit that *Childs* is not concluded by the former recovery. We had the choice to give him notice, and make him a party, thereby concluding him; or to defend without him. But this does not vary the truth of the case;

though it varies the mode of proof. We were, however, bound to plead the former suits, and the consequent recovery, to complete our right. (3 *Coven*, 330, 1, &c.) *Ash v. Bushnell*, cited on the other side, from *Cro. Jac.* 255, was after verdict. But clearly the declaration would have been held bad, if the defendant had demurred.

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While arguing, *Manning's Dig.* has been put into my hands, containing, (*Limitation of Actions*, (A) (a) pl. 2,) the following note of *Compton v. Chandless*, (4 *Esp. Rep.* 18,) which I had not seen: "If the statute be pleaded to an action against an attorney for negligence, *semble*, that the six years must be reckoned from the period at which the plaintiff was damnified; not from the time when the blunder was committed." (*Kenyon*, C. J.) Several cases will be found cited at the end of that note in support of the doctrine from *Espinasse*. (*Peake v. Ambler*, *W. Jon.* 329.(a) *Cro. Car.* 359, *S. C.* *Shutfen v. Penow*, *ibid.* 138. *Hughes v. Thomas*, 13 *East*, 474. *Littleboy v. Wright*, (b) 1 *Lev.* 69. *Hickman v. Walker, Willes*, 27.)

Foot, in reply. The gentleman's illustration by the case of a pit dug seven years ago, is inapposite. The digging does not occasion the injury, but the falling in. The hypothesis of the stage driver is certainly apposite, if followed up with the addition that the owner of the line is a passenger in the stage. Short of this, it is not; for the proprietors do not own the arm of a stranger passenger. Here, the plaintiffs were the passenger; or, to drop the simile, they were the holders of the note; not, as is supposed, the persons who endorsed it for collection. The plaintiffs

(a) The 3d *res.* in *Jones*, (330) is in these words: "If an assumpsit be, and the damnification accrue, not at one time, but parcel at one time, and parcel at several times after, as in this case, he may have entire action after the last time of damnification; and though parcel of the damnification was before 6 years of the action brought, and parcel within six years, yet the action well lies, notwithstanding the statute of 21 *Jac.*" The action was on a promise of indemnity. The report in *Cro. Car.* 349, by the title of *Peck v. Ambler*, does not recite this general resolution in so many words; but the case is to the same effect.

(b) Slander, *per quod*, &c. Held, that the statute ran from the time of the special damage, which is the cause of the action.

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were treated and considered as the holders in the former suits. The note was protested in their names ; and notice should have been given in their names. Their endorsers had no right to an action against *Childs*. But I deny that in the case supposed, of the stage driver, his master's action depends on the suit by the injured party. Suppose he break seven arms of seven different passengers by the accident, may the master wait, and have seven separate actions against his servant at twelve years distance of time, or more, according to the date of the several suits and recoveries against the former ?

No decision can be found recognizing the distinction advanced, between pleading the statute in answer to immediate and consequential injuries. There is such a distinction in reference to the nature of the action, as whether it shall be trespass or case ; but this is the first time I have heard it applied to the statute of limitations. If it be held in a case of damages remote, the next must be of those more immediate ; and thus we may go on to all the actions upon the case. In legal language and contemplation, the damages were not contingent in the principal case. If *Childs* was amenable to the endorsers of the bank, and the former had sued him, this would not prevent their suing the bank. But if there was this contingency of election, its consequence is mistaken. The right to demur does not follow ; but the gentleman should have taken issue on our plea of the statute, and given the matter in evidence at the trial, or he should have replied this fact specially.

It is admitted that the moment one cent of damages accrued to the plaintiffs, their right of action arose. This admits that the recovery did not give the cause of action ; but only determines the amount of damages. A contingency is a matter which no one can control. The case of a promissory note, payable on demand, is stronger than the one put by Lord *Mansfield*, in 3 *Burr*. 1281, and cited against us ; yet the statute runs from the date.

In the case put, of the injury to the servant, *per quod servitium amisit*, it is the loss of service, not the injury, which gives the right of action to the master.

This is not a technical contract of indemnity, but a promise to do a certain act. When a contract of indemnity is shown, we shall be ready to meet the question of the statute in relation to that. The present is a case of tort, and not of indemnity. It is admitted, as to the case put, of a clerk of the county, who omits to record a deed, a fixed liability to eviction, without eviction itself, is enough to constitute a ground of action. This admission, alone, gives us the cause.

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*Curia, per* WOODWORTH, J. (after stating the pleadings.) The question to be decided is, whether the statute of limitations began to run from the time when the note fell due, since which more than six years elapsed before the present suit was commenced; or from the time of the recovery against the plaintiffs, which was within six years.

It is contended, that the cause of action was not complete until the plaintiffs sustained damages. I apprehend this cannot be the test. On the principle assumed, the defendant's liability might continue indefinitely, when, from the nature of the case, there is no such necessity. He was liable to be prosecuted by the plaintiffs, immediately after his default. He was their agent. In such an action, it is true, a question might be, what damages have the plaintiffs sustained? That would depend on the insolvency, or probable extent of the insolvency of the makers. To that extent, the plaintiffs were answerable to *Smedes & Canfield*, the holders of the note. The defendant could not object that *Smedes & Canfield* had not recovered of the plaintiffs. It would be a sufficient answer, that they were liable to the same measure of damages claimed from the defendant. To that amount, a loss had arisen, which the defendant ought to pay. He had no concern with the inquiry, whether the holders of the note would or would not, at a future period, call on the plaintiffs for the loss. I consider the cause of action against the defendant, to rest on the default in not giving notice;

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and as arising immediately on the happening of that default. And if so, the statute began to run from that time. The case of *Miller v. Adams*, (16 *Mass. Rep.* 456,) contains a recognition of the principle. The former brought an action against the latter, a deputy sheriff, for making a defective return to an original writ, sued out against several defendants. The omission was, to return a summons as to two of the defendants; for which cause, the judgment obtained against them was reversed. *Adams* pleaded the statute of limitations; upon which the question was, whether it ran from the time when *Miller* was actually damnified by the reversal, or when the return was made; and held the latter. The court say, the judgment being then liable to reversal, the plaintiff might have immediately brought his action, and would have been entitled to his damages. A like principle will be found in two late cases, decided by the English K. B. (*Baitley v. Faulkner*, 3 B. & A. 288; and *Short v. M'Carthy*, *id.* 626.) In the last, the plaintiff, as here, declared in assumpsit; and stated as a breach, that the defendant did not diligently and sufficiently make search at the bank of *England*, to ascertain whether certain stock was standing in the names of certain persons, the defendant having been employed as an attorney so to do. The omission to search, took place more than six years before action brought. The court held the omission to search was the cause of action, from the time of which the statute ran.

The recovery in the former case cannot be the measure of damages, because there is no averment that the defendant had notice; and consequently, for aught that appears, he had no chance of defending as to the material point. What has been lost by the neglect? It will scarcely be contended, that if, notwithstanding the omission to charge the endorser, the makers of the note were unquestionably responsible, and of undoubted credit, the holders were entitled to recover the whole amount of the note. The defendant is not to be charged with the amount of the judgment when he has not been heard. If, indeed, the plaintiffs had given notice to the defendant of the suit


commenced against them, and required him to defend, I incline to think he would be concluded as to the damages. But even then, it must appear that the action was commenced against the defendant within six years; for the right of action was complete the moment after the neglect. If the plaintiffs omitted to prosecute till after a recovery against them, and that was after six years, the remedy would be barred by the statute.

If the view I have taken be correct, it follows that the plaintiffs might have sustained their action, without waiting to be prosecuted, or paying damages to the holders. If, however, it were otherwise, I think payment of the damages by the plaintiffs, without suit, would not have been in their own wrong; although it would be attended with risk in this respect. If they could not show that the damages sustained by the defendant's default, was equal to the sum paid in satisfaction to the holders, they would incur a loss *pro tanto*. The defendant would be bound to indemnify for the amount paid, provided it did not exceed the injury proved at the trial. Beyond this, he would not be holden. If it be necessary to have paid the damages in the first instance, I do not see how the plaintiffs, under the circumstances in which they were placed, could avoid this risk.

On the argument, this action was likened to the action for an injury to a servant, *per quod servitium amisit*; and the case of digging a pit in the highway seven years ago, in which the plaintiff's leg was broken five years afterwards, and several like cases. The difference between the two cases mentioned, and the present case, is this: here the damages accrued at the time of the defendant's default. In the cases mentioned, and supposed to be analogous, no damages accrued, (except perhaps nominal in the case of the servant,) until the loss of service took place, or the limb was broken. The same answer may be given to several other cases put upon the argument.

I am of opinion that the defendant is entitled to judgment; but the plaintiff may amend on payment of costs.

Judgment for the defendant.

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JACKSON, *ex dem.* Hogarth and wife, *against* NELSON.

Jackson
v.
Nelson.

EJECTMENT, tried at the *Putnam* circuit, *October*, 1824, before WILLIAMS, C. Judge.

In ejectment by the heir at law against a devisee, a co-devisee, and tenant in common with the defendant, not in actual possession, may be a witness for the defendant.

And this, especially, if he say, on his *voire dire*, that he does not know that he is interested.

At the trial, the following facts appeared : *Joshua Nelson* died in 1817, seised in fee of the premises in question ; and the wife of the lessor of the plaintiff was a grand-daughter of the deceased ; and, as one of his heirs, entitled to one third of the premises in question.

The defendant set up a devise from *Joshua Nelson*, of his land, including the premises in question, to his only son, *Jacob Nelson*, for life ; remainder to the children of the latter, viz. *Cornelius*, (the defendant,) *Samuel C.*, *Jacob*, *Joshua*, and *James M.*, &c. in fee. *Jacob*, their father, died in 1811, leaving his five sons living at his death, and three daughters.

The plaintiff alleged that the ancestor, *Joshua Nelson*, burnt the will in *October*, 1813 ; and the defendant, that at the time of burning, the testator was not of sound mind. And this was the question at the trial.

Samuel C. Nelson, one of the devisees, (but who was not in actual possession as such,) was offered as a witness for the defendant ; and though objected to, (being sworn on his *voire dire*, and stating that he did not know that he had any interest,) was admitted by the judge, and sworn.

Verdict for the defendant.

T. J. Oakley, for the plaintiff, moved for a new trial. He relied on *Brant v. Dyckman*, (1 *John. Cas.* 275,) as decisive against the admissibility of the witness. There, he said, the witness was not allowed to prove himself even in possession. Here the witness was allowed to protect both his interest and possession. The possession of his co-tenant was his.

W. Nelson, contra, cited *Van Nuy v. Terhune*, (3 *John. Cas.* 82,) that a mere interest in the question, is no objection ; but it must be an interest in the event.

Here the witness was not in possession ; and the verdict could never affect him. It follows that he was competent. (*Jackson v. Rumsey*, 3 *John. Cas.* 234. *Jackson v. Bard*, 4 *John. Rep.* 230. *Jackson v. Van Duzen*, 5 *id.* 144. *Stockham v. Jones*, 10 *id.* 21.)

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*Curia*, per SUTHERLAND, J. (*after stating the facts.*) In *Brant v. Dyckman*, the defendant denied that he was in possession when the action was commenced ; and called one *Vredenberg*, to prove that he, *Vredenberg*, at the commencement of the suit, was, and then still continued to be, in possession ; and not the defendant. He was excluded by the judge, and the supreme court held him incompetent. They say, "If he was in possession, he had an immediate interest to protect that possession and prevent a recovery." "Whether this be considered," they continue, "an interest in the *event* of the suit, or in the *question*, between the parties merely, it is one of those cases in which the reason and policy of the law ought to exclude a witness. His interest in the question of possession, is almost the same as that of the defendant himself."

Admitting this decision to be sound, I think the present case is distinguishable from it. The witness was there called to support his own *actual* possession. A verdict against the defendant, would have resulted in a judgment and execution, by which the witness would inevitably have been turned out of possession. But in this case, the possession of the witness is *constructive* merely, not *actual*. The effect of a recovery on the part of the plaintiff cannot be, to turn him out of actual possession ; nor can the verdict be evidence for or against him, in any other suit. It is an interest in the *question* merely, and not in the *event* of the suit. (3 *John. Cas.* 234. 4 *John. Rep.* 232. 5 *id.* 158. 10 *id.* 21.)

Besides, the witness was sworn on his *voire dire*, and testified that he did not reside on the premises in question, and had no interest in them that he knew of. There may have been a partition.

Motion for a new trial denied.

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Rapelye  
v.  
Mackie.

RAPELYE and SMITH, survivors of Lawrence, *against*  
MACKIE and others.

The plaintiffs, having cotton at three stores, in *Brooklyn*, 69 bales marked *G. G. & Co.* at the store of *B.*, and 30 of the same mark, at the store of *M. & W.*, sold 66 bales marked *G. G. & Co.* to the defendants, delivering them a *pro forma* bill of parcels thus: "66 bales, say 19,800 lbs.—\$12 per cwt.—1 per cent. off;" the defendants paying at the time, \$1800, in part for the whole. Then the cotton in *M. & W.'s* store, was destroyed by fire, and the defendants demanded of the plaintiffs an

ASSUMPSIT for goods sold and delivered, and goods bargained and sold, tried at an adjourned circuit in the city and county of *New-York*, *January 30th*, 1824, before EDWARDS, C. Judge; when the jury found a verdict for the plaintiffs, for 471 dollars 90 cents, being the price, with interest, of 66 bales of cotton, (after deducting \$1800 paid by the defendants,) which the plaintiffs claimed on the trial to have sold and delivered to the defendants.

The facts proved at the trial are sufficiently stated in the opinion of the court.

*J. Duer*, for the defendants, moved for a new trial. He made the following points, and cited the authorities which follow, in support of them:

1. Where goods sold are parcel of a larger quantity, the property does not vest absolutely in the vendee, so long as there is no selection or designation of the part sold, or separation of it from the part unsold. (2 *John. Rep.* 16. 14 *id.* 167. 7 *East*, 558. *Shep. Touch.* 224. *Long on Sales*, 149.)

2. Where any act of the seller, such as counting, weighing, &c. remains to be done, to ascertain the exact quantity sold, the property does not vest absolutely in the order for the 66 bales, which was refused; but the plaintiffs gave an order for 36 bales. These were then weighed by the plaintiffs; and another bill of parcels delivered to the defendants, including the 36 bales, according to the weigh master's bill; and the 30 bales at a certain weight each, with the remark, "deduct, for supposed loss, 150." The 36 bales were delivered at the time of weighing.

*Held*, that the property of the 30 bales did not vest in the defendants; and that, therefore, the plaintiffs could not recover the price.

The 30 bales not being identified in the contract, and specifically sold, the contract might have been satisfied by a delivery of 30 bales with the mark mentioned, from any other place beside *Brooklyn*; or if the contract related to *Brooklyn*, then out of any other store there, beside *M. & W.'s*; or if the contract had been to sell the 30 bales at *M. & W.'s*; yet, they, not being weighed, did not pass.

When something remains yet to be done, as between buyer and seller, or for the purpose of ascertaining either the quantity or price of the article sold, there is no delivery; and the property does not pass, though the price be in part paid.

And so, if there be a part delivery, the other part not yet ascertained, will not pass.

And there need not be an express agreement that something farther shall be done. It is enough that it appear, from the circumstances of the case, to be necessary.

vendee ; but until such act is done, remains at the risk of the vendor. (2 *H. Bl.* 123. *Bull. N. P.* 50. 12 *John. Rep.* 165. 13 *id.* 53. *Long on Sales*, 154 to 157. 5 *Taunt.* 617. 2 *M. & S.* 397. 15 *John. Rep.* 349. 2 *Campb.* 240. *Ross on Vendors and Purchasers*, 28.)

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3. In the present case, there was neither an actual nor constructive delivery to the defendants, of the 30 bales of cotton that were burnt in the store of *Merry and Waite*. (2 *N. R.* 61.)

4. That the payment of part of the price, does not, of itself, alter the property in the thing sold ; but only binds the bargain. (2 *Bl. Com.* 448).

*G. Griffin*, contra, insisted on the following points, (among others,) and cited the authorities which follow, in support of them :

1. There was a complete sale by the plaintiffs to the defendants, on or before the 21st of *August*, 1822, of the 30 bales of cotton consumed by fire in the store of *Merry and Waite*. (11 *East*, 211. *id.* 219, per *Bayley, J.* *id.* 210. 2 *H. Bl.* 504. 4 *B. & P.* 69. 6 *East*, 614. 14 *id.* 614. 4 *Campb.* 237. 13 *East*, 522. 4 *Taunt.* 644. 5 *id.* 176. *id.* 617. 2 *M. & S.* 397. 7 *East*, 558. 1 *Pickering*, 476. *Noy's Max.* 88. 2 *Bl. Com.* 448.)

2. The contract of sale was entire ; and by accepting the two parcels that remained, after the fire, the defendants recognized and ratified the contract *in toto*.

*Curia*, per *WOODWORTH, J.* On the 21st of *August*, 1822, the plaintiffs sold to the defendants 66 bales of cotton, marked *G. G. & Co.* As evidence of the sale, the bill of parcels delivered to the defendants was produced, on which the charge is made thus : "66 bales, say 19,800 lbs. \$12 per hundred, \$2376, 1 per cent. off." The defendants paid, at the time, \$1800.

The plaintiffs' cotton was in three stores at *Brooklyn* ; one kept by *Van Bokkelen*, another by *Caze & Richaud*, and the third by *Merry & Waite*. There were 69 bales, of the mark sold, in the store of *Van Bokkelen*, and 30 bales in the store of *Merry & Waite*. A night or two

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after the delivery of the bill of parcels, the 30 bales were burnt. They had been weighed about the 16<sup>th</sup> or 17<sup>th</sup> of July. No order for delivery was given. The bill was a *pro forma* bill; the weight not being precisely ascertained. The plaintiffs' witness testified that he presumed the word, "say," denoted that the estimate was made from the invoices; that had the weight been actually ascertained, and the cotton delivered, the deduction of 1 *per cent.* would have been carried out on the bill of parcels.

On the 5<sup>th</sup> of September, another bill was delivered to the defendants, charging the 36 bales according to the weigh master's bill, which was produced. The 30 bales were inserted at a certain weight each, with a remark, "deduct for supposed loss, 150." The 36 bales were weighed at the request of the plaintiffs, as the witness supposed, at the time of delivery to the defendants, and subsequent to the fire: and if the sale had been made by the original invoice, the cotton would not have been re-weighed, according to the usual course of business. After the fire, the defendants called for an order for 66 bales, which was refused; but an order for 36 was given.

On this statement, I am of opinion the plaintiffs are not entitled to recover for more than 36 bales.

The ground upon which the defence rests is, that, as to the 30 bales, burnt in the store of *Merry & Waite*, there never was a delivery. This is apparent from the fact, that there was no proof as to the identity of this parcel. It would have been competent for the plaintiffs to deliver the number of bales sold, from any parcel, whether stored at *Brooklyn*, or in the city of *New-York*; and such a delivery would have satisfied the contract. The bill of parcels is general. There is no specification of the particular bales, or the place where stored. A number of bales containing the quantity, is all that appears to have been required. The defendants could not insist on receiving the specific quantity at *Merry & Waite's*; and unless they had this right, I do not perceive on what ground they are to be subjected to the loss. The principle would render them liable for property which the plaintiffs might or might not

have elected to deliver, in satisfaction of the purchase. The case presented, is one where a smaller parcel is sold out of a larger, without any designation. Had there been, it may be presumed the plaintiffs would have produced proof of it. The broker who made the contract was in court, and not called.

But if it be admitted that the purchase was of cotton stored at *Brooklyn*, the only specification is, that the bales were marked "*G. G. & Co.*" No reference is had to *Merry & Waite's* store in particular. At that very time the plaintiffs had 69 bales of this description at *Van Bokkelen's*. Will it be pretended that a delivery of 66 bales of *this parcel*, would not have satisfied the purchase? If it would, then it may be asked, where is the proof that the defendants had acquired an absolute right to the 30 bales burnt?

There is another conclusive objection against a recovery. The cotton was to be weighed, before the delivery was complete. It is not necessary there should appear an express agreement was made to that effect. The first bill of parcels was well described by the plaintiffs' clerk, as a *pro forma* bill. It was conjectural as to the quantity. The one *per cent.* was not carried out for that reason. The subsequent act of weighing was indispensable, unless the defendants had agreed to accept the cotton according to the estimate made. The plaintiffs must have so considered it. It was re-weighed at their request. Then, for the first time, the one *per cent.* was deducted. It was then ascertained that the quantity was less than originally calculated. These facts show very satisfactorily, that the delivery was not complete when the 30 bales were burnt. Indeed, it is difficult to conceive upon what principle the seller would consider that there was a delivery, when it was not ascertained how much was sold, or the amount to be received. The principle that runs through all the cases is, that when something remains to be done, as between buyer and seller, or for the purpose of ascertaining either the quantity or price, there is no delivery. Whether the

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question arises where the property is destroyed, or where the right of stopping *in transitu* is drawn in question, cannot make a difference. If a delivery has been made, the goods are at the risk of the purchaser; and the seller's right of stopping *in transitu*, ceases.

The delivery of the 36 bales after the fire, was not a recognition of the right to claim for the residue. The defendants demanded, and were entitled to 66 bales. The acceptance of a part is in exoneration of the plaintiffs, *pro tanto*; leaving the question, respecting the residue, as it was before that delivery.

The following authorities will be found to support the doctrine upon which we rest the decision of this cause: 15 *John.* 349; 6 *East*, 614; 11 *East*, 210; 12 *East*, 614; 11 *East*, 522; 2 *M. & S.* 397; 4 *Campb.* 237.

There must be a new trial, with costs to abide the event.

New trial granted.

SOUTHARD *against* REXFORD.

A witness
may be asked
a question, the
answer to
which will
criminate
him; and, if
he has no ob-
jection, may
answer it.

ASSUMPSIT, for breach of promise of marriage; tried at the *Saratoga* circuit, *June*, 1825, before WALWORTH, C. Judge.

The plea was the general issue, with notice that the defendant would prove in his defence, that the plaintiff

His privilege is personal only: but it is the duty of the court to advertise him of it.

And where, in an action for breach of promise of marriage, the defendant asked his witness if he ever knew of any person having criminal connexion with the plaintiff; and the judge would not suffer the question to be put; but himself told the witness he might, if he pleased, state any improper intercourse, if there had been any between the plaintiff and him; *held*, that this was not a violation of the rule.

A jury may infer mutual promises of marriage from the defendant's visits to the plaintiff as a suitor, and his declarations that he had promised to marry the plaintiff.

After a defendant has once broken a promise of marriage, his offer to renew it, is no defence to an action for the breach.

In an action for breach of promise of marriage, if the defendant give notice, with his plea, that he will prove that the plaintiff has been guilty of fornication; but fail entirely to show it on the trial, the jury may consider this in aggravation of damages.

The damages in this action are in the sound discretion of the jury, under the circumstances of each particular case.

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had, at various times, and with various persons, specifying them, committed fornication after the alleged promise.

The defendant attempted, at the trial, to prove this branch of his defence by one *Stephen Aylesworth* and others; but failed.

When *Aylesworth* was upon the stand, the counsel for the defendant asked him if he ever knew of any person having criminal connexion with the plaintiff?

The judge told the witness he need not consider that question as including himself; that he was not bound to say any thing respecting himself. That if he said he did know of any person, the plaintiff's counsel must be permitted to inquire who it was, in order to test his credibility, or for the purpose of enabling him to call witnesses to disprove it.

The witness then answered the question in the negative.

The defendant's counsel then claimed the right of putting the question in such manner as to include the witness in the answer to be given; leaving it to him to make the objection to answering it, if he thought proper.

The judge decided that it was improper to put a question to a witness, when it clearly appeared he was not bound to answer it. That the right of the witness to be exempt from declaring his own infamy or guilt, was perfect; and must be preserved to its fullest extent. That it is the province of the court to decide, whether a direct answer to the question proposed, will furnish evidence against the witness. In such cases, the witness is not bound to answer the question either way, although the truth may not criminate him; and in all such cases it is the duty of the court to interfere, and prevent the question from being put to the witness; and not compel him to claim an exemption from answering, on the ground that it would criminate himself; because the very claim of exemption would cast a suspicion on him. Neither would the judge permit the counsel for the defendant to cast a suspicion upon the character of the plaintiff, by asking their own witness a question which he might refuse to answer, for the purpose of creating such a suspicion. That when the answer to a question cannot directly implicate

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the character of the witness ; but may do it collaterally ; then the question may be put ; and the witness must claim his exemption ; and show how it may implicate him. And he must, in addition to that, on his oath, declare, that his answer will, in his opinion, have that tendency.

The judge, therefore, refused to allow the question to be put in the form proposed ; but told the witness that he was at liberty to state any improper intercourse, if there was any such, between the plaintiff and him.

Other questions upon the trial were, whether a valid promise of marriage was proved ; and whether, if proved, it had been rescinded ; both of which the judge left to the jury upon the evidence. Another question was, whether an offer by the defendant to renew his promise of marriage, and a refusal by the plaintiff, was a defence ; as to which the judge charged, that if the defendant had violated his agreement, and, in consequence, the connexion between the parties had been broken off, the offer and refusal were no defence.

As to the damages, he charged, "that in cases of this kind, the damages are always in the discretion of the jury ; and in fixing the amount, they have a right to take into consideration the nature of the defence set up by the defendant. That in his defence, he had attempted to excuse his abandonment of the plaintiff, on the ground that she was unchaste, and had committed fornication with different individuals. But it appeared from the testimony of his own witnesses, that her character in that respect had not been tarnished even by the breath of suspicion. That with such a defence on the record, a verdict for nominal or trifling damages might be worse for her reputation than a general verdict for the defendant. That if the defendant had won her affections, and promised her marriage ; and had not only deserted her without cause, but had also spread this defence upon the record, for the purpose of destroying her character ; the jury would be justified in giving exemplary damages."

The judge also commented at length upon the testimony ; and expressed to the jury a decided opinion in favor



of the plaintiff on all the questions of fact submitted to their decision.

The other facts are stated in the opinion of the court.  
Verdict for the plaintiff for \$750.

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*A. C. Paige*, for the defendant, moved for a new trial. He insisted there were no mutual promises of marriage proved: the promise of the defendant, therefore, was without consideration. But if there was a binding promise, the plaintiff's second engagement of marriage with another, was a rescission of that with the defendant. (*Holt's N. P. Rep.* 151. 3 *Mass. Rep.* 189.) Besides, the defendant was discharged from his contract by his offer to perform, and the plaintiff's refusal. (17 *John.* 175. 1 *Chit. Pl.* 318.) Her refusal to receive the defendant's visits, and receiving those of others, were a breach of the contract on her part, and discharged the defendant.

The judge erred in overruling the question proposed to be put to the witness. (3 *Taunt.* 424. 1 *Phil. Ev.* 205-6, and the cases there cited; *ed.* 1820. 3 *Campb.* 210, 519. 4 *Esp. Rep.* 226.)

The judge erred in charging that if the contract had been broken off without the plaintiff's fault, she was not bound afterwards to receive the defendant's addresses.

He also erred in charging that the damages were in the discretion of the jury; and that the defence interposed should aggravate the damages. 15 *Mass. Rep.* 48. 2 *Phil. Ev.* 103, 106, 107. 3 *John.* 62, 64-5. 9 *id.* 51.)

*S. G. Huntington*, contra, cited 3 *Campb.* 519; 4 *Esp. Rep.* 225, 242; 1 *Phil. Ev.* 206, *ed.* of 1820; 2 *Esp. Dig. Gould's ed.* 405, *per Marshall, Ch. J.* in *U. States v. Burr*; 2 *Com. on Contr.* 410.

*Curia, per SUTHERLAND, J.* Whether there were mutual promises of marriage between the parties or not, was properly left by the judge to the jury, as a question of fact. The evidence abundantly supports the verdict upon this point. The promise on the part of the defendant was clearly proved. In *January*, 1819, he admitted to an *Eli-*

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za Peck, that he had promised to marry the plaintiff, and intended to fulfil his engagement. About the same time, he told the brother of the plaintiff, that he intended soon to marry her. A number of witnesses testified, that from *June*, 1818 to 1823, the defendant visited the plaintiff as a suitor, and was apparently well received by her; and it was matter of public notoriety that he was courting her. The fact of an engagement of marriage between the parties; of a promise on the part of the plaintiff as well as of the defendant, is necessarily to be inferred from this evidence.

It was also correctly submitted to the jury, to determine as a question of fact upon the evidence, whether the engagement had been rescinded by mutual consent, or had been broken off by the plaintiff before any breach on the part of the defendant. It was contended that the contract was broken by a subsequent engagement of the defendant to one *Stephen Aylesworth*, in the spring of 1819. On this point, the evidence, on the part of the defendant, was of a very doubtful and suspicious character. The case states that *Stephen Aylesworth*, who swore to the engagement, upon cross-examination by the court, repeatedly contradicted his previous statements, and told several different stories, as to the time when the agreement to be married was made between him and the plaintiff. The testimony of *Abel Aylesworth* and *Samuel Peterson*, as to the confessions of the plaintiff, that she was engaged to be married to *Stephen Aylesworth*, were not free from just grounds of suspicion. The jury, without doubt, entirely disregarded the testimony of *Stephen Aylesworth*; and if they believed the other two witnesses, they probably supposed the declarations of the plaintiff were not made in earnest; as all the testimony shows that, at this very period, the defendant was constant in his attention to her, and was publicly considered as her suitor, and received by her in that character.

The offer made by the defendant, a short time previous to his marriage, to renew his attentions to the plaintiff, and her refusal to receive them, afford him no defence against

this action. The only evidence upon this point is derived from the confessions of the plaintiff to *Olive* and *Peter Tarpenny*. She stated, that a short time before the defendant courted his present wife, he came to her, and wanted to be friendly again. *She told him he had deceived and disappointed her so often, that she could have no confidence in him.* That the defendant then told her he was determined to get married, and that unless she received his visits, he would go somewhere else. She then replied, that he might go for what she cared. The fair construction of this conversation is, that the defendant had previously violated his engagement; that the plaintiff considered him so faithless, that no reliance could be placed upon his promises, and she therefore refused to permit him to renew his visits. It is to be remarked, that the defendant does not, on this occasion, offer to marry the plaintiff, but only to renew his addresses. She chose to consider the connexion between them as at an end; and not subject herself to the pain and mortification of being again deceived. The defendant's offer is not to consummate the original contract, but to make a new one. Then she had a right to decline.

I think the judge erred in preventing the defendant from asking the witness, (*Stephen Aylesworth*) in general terms, if he ever knew of any person having criminal connexion with the plaintiff. The witness was not bound to answer the question, so far as the answer would criminate himself; and it was the duty of the court to apprise him of his right in that respect. But if a witness, under such circumstances, thinks proper to waive his privilege, I do not understand it to be either the duty, or the right of the court, to force it upon him, and to deprive the party of the benefit of such disclosures as he may voluntarily make. It is a personal privilege only. The fact that the witness had criminal intercourse with the plaintiff, the defendant had an undoubted right to establish. The witness was entirely disinterested, and as competent to testify to that fact as any other. No man shall be compelled to criminate himself; but if, from a sense of justice, or any other consid-

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eration, he is willing to make disclosures which involve his own character, and may expose him to punishment, I know no reason either of law or policy which should prevent him.

If a question of this description cannot be put in general terms, how is a *particeps criminis* ever to testify against his associates?

In *Phillips*, the rule is thus stated: "A witness cannot be *compelled* to answer any question which has a tendency to expose him to penalties, or to any kind of punishment;" (1 *Phil. Ev.* 222;) and I have found no case, where the object of the question was to establish a fact material in the cause, and not directly to impeach the character of the witness and render him incompetent, in which the court have ever interfered, except upon the application of the witness. (3 *Campb.* 210, 519. 3 *Taunt.* 424. 13 *East*, 58, note. 4 *Day*, 123. *U. States v. Burr.* 2 *Esp. Dig.* 405, per *Marshall, C. J.* 13 *John.* 82, 229.) The language of the judges, in all the cases is, that the witness *is not bound* to answer a question, the object of which is to criminate or render him infamous. In *Rex v. Lewis*, (4 *Esp. Rep.* 225,) the witness, on his cross-examination, was asked "if he had not been in the house of correction in *Sussex*." Lord *Ellenborough* interposed; and said the question should not be asked. So in *M^r Bride v. M^r Bride*, (4 *Esp. Rep.* 243,) Lord *Alvanley* would not permit a witness to be asked, "whether she lived in a state of concubinage with the plaintiff." In both these cases, the questions were put on the cross-examination, and with the sole view of directly impeaching the witnesses. They cannot be supposed to have been willing to answer them; and though it does not affirmatively appear that they objected, yet, from the very nature of the case, such undoubtedly was the fact. (*Peak. Ev.* 129, *et seq.*)

But although the judge refused to permit the defendant's counsel to put the question generally to the witness, so as to include himself as well as others, in which I think he erred; still, he informed the witness that he was at liberty to state any improper intercourse, if there had been any,

between him and the plaintiff. The witness, therefore, was not prevented from making a full disclosure; and though, perhaps, he would be less likely to do it under such circumstances, still I do not think it a sufficient cause for setting aside the verdict.

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Upon the question of damages, the charge of the judge appears to me to be unexceptionable. There can be no settled rule by which they are, in every case, to be regulated. They rest in the sound discretion of the jury, under the circumstances of each particular case; and where the defendant attempts to justify his breach of promise of marriage, by stating upon the record as the cause of his desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages. A verdict for nominal or trifling damages, under such circumstances, would be fatal to the character of the plaintiff; and it would be matter of regret indeed, if a check upon a license of this description did not exist, in the power of the jury to take it into consideration in aggravation of damages.

The damages do not appear to be excessive.

New trial denied.

WOLFE against WASHBURN and HAM.

COVENANT on a sealed agreement, dated *August 14th, 1824*, reciting that *Washburn* had occupied for three years, to pay one, money which belongs to an-

other, and so appears on the face of the covenant, may be sued for and recovered in the name of the covenantee; and it does not lie with the covenantor to object that the suit is not sanctioned by the *cestui que trust*.

To warrant a set-off, there must be a subsisting debt due *in presenti*, and it must be due from the plaintiff to the defendant; and if it be due from the plaintiff and another to only one of the defendants, it is not admissible as a set-off; and though it be claimed by the defendants, and allowed by the jury as a set-off, the claim being, in fact, due to but one defendant, and not payable at the time, this is no bar to a subsequent action for the same demand when it becomes payable, in favor of the defendant to whom it is really due.

The certificate of a justice, that a certain demand was claimed before him by the defendant as a set-off, is extra-judicial, and therefore not conclusive, and may be contradicted by parol evidence, showing that the demand was not so claimed.

The official certificate of a justice within the statute, (*sess. 47, ch. 138, s. 29*.) can regularly contain no more than the process, pleadings, evidence, verdict and judgment; not what was stated before him by way of argument.

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certain land of which one *Hallenbeck* died seised ; and that *Washburn* also occupied it at the date of the agreement, at \$58 rent for the first, and \$65 for the two last years ; that half this rent was claimed by one *More* ; that *Hallenbeck* left an infant son and a widow, who married the plaintiff. The defendants then covenanted by this agreement with the plaintiff, as well on behalf of the heir at law and the widow, his wife, as in his own behalf, that within six months from the date, they would pay him the rent recited, or so much as still remained due, and ought to be accounted for and paid to the heir at law, or widow, or any other representative of the rights and interests of *H.* (the ancestor.)

Plea. 1st, *non est factum* ; and 2d, that on the 14th of January, 1825, *Washburn* (one of the defendants) impleaded the plaintiff and his wife in assumpsit, before *J. A. Showerman*, a justice ; and that on the trial, February 7th, 1825, the plaintiff and his wife gave in evidence, in support of their defence, the covenant declared on ; and the jury allowed and set off the money due and owing for the rent secured to be paid by the covenant, against *Washburn's* claim, and rendered a verdict for him, which was followed by a judgment.

The defendants also gave notice, with these pleas, that they would prove in their defence, that after the execution of the covenant in question, and before this suit was commenced, *Thaddeus Reid* was, by the surrogate of *Columbia*, appointed guardian of the infant, and that this suit was prosecuted by the plaintiff for his own benefit, without the authority or direction of the guardian.

The plaintiff replied to the 2d plea, that he did not give in evidence, or claim the covenant in question as a set-off on the trial in that plea mentioned ; and that he did not claim the money secured by the covenant as a set-off, and did not consent to a set-off.

The cause was tried at the *Columbia* circuit, September, 1825.

On the trial, the execution of the covenant being admitted, the defendants proved the facts stated in their notice, and then moved for a nonsuit, which was overruled.

The defendant then gave in evidence the certificate of *J. A. Showerman*, the justice, to prove the facts pleaded in the second plea. The certificate stated that the plaintiff's account before him was more than \$100; that the covenant, now in question, was given in evidence by the defendants, who claimed to have the rent allowed them by the jury; that the jury, after being out a short time, sent for the covenant; that they found for the plaintiff \$7,75. This certificate was drawn up by the defendants' attorney, under the direction of the justice, during the circuit. It was authenticated by the certificate of the county clerk, in the usual form; the certificate of the justice being dated the 27th, and that of the clerk the 30th of September, 1825.

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The certificate of the justice was objected to as evidence, on account of the manner in which it was drawn up; but was received.

Several of the jurors before the justice were then sworn as witnesses for the present defendants, and stated that they allowed the rent, or a part of it, to the defendants, on the trial before the justice.

The plaintiff then offered in evidence a copy of the minutes of the justice, taken at the trial, verified by the official certificate of the justice, who was in court, and there fixed his seal; to contradict his first certificate. This was objected to, but received; and the balance of proof was, that though the jury allowed the rent to the defendants, yet it was not claimed by them as a set-off; but the covenant was given in evidence by them, to show that the payment of the plaintiff's demand had been by the agreement of the parties postponed, and that the suit was prematurely brought; that a part of the plaintiff's demand was for the rent of a room and pasture; and the covenant was mentioned by the defendants on the trial in reference to those charges; that the plaintiff, however, told the jury that they should allow the rent as a set-off.

Verdict for the plaintiff for \$10,05, subject to the opinion of the court on a case containing the facts.

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Other particulars will be found stated in the opinion of the court.

C. Bushnell, for the plaintiff. The action was rightly brought in the name of *Wolfe*. (11 *John*. 91.)

The judge properly admitted the evidence in contradiction of the justice's certificate. (3 *Cowen*, 126. 18 *John*. 354. 4 *Cowen*, 458. *Com. Dig. Action*, (L. 4,) *new ed.* 16 *John*. 136.) So far as it related to the fact of set-off, it was extrajudicial. (*Laws N. Y. sess.* 47, *ch.* 238, *s.* 29.)

The covenant was not admissible as a set-off before the justice. (11 *John*. 91. 12 *id.* 343. 4 *John*. *Ch. Rep.* 136. 4 *John*. *Rep.* 510.) And if received as such, it cannot affect the plaintiff's claim.

The proceedings in the former suit were not between these parties; nor was the demand on the covenant between the parties in that suit. It was inadmissible as a set-off in any view.

D. B. Tallmadge, contra. No doubt this rent has once before been recovered; and that too by persons authorized to receive it; one of them being [this very plaintiff. (5 *John*. 66.) But the plaintiff has no rights. They passed to *Reid*, the guardian, on his appointment. He cannot be deprived of them by the plaintiff's act, who was a mere trustee for the infant, or the infant's guardian. The debt being, in truth, due to the guardian, he has a right to control it, though the plaintiff is the nominal creditor. (1 *John*. *Cas.* 411. 11 *John*. 47. 3 *id.* 425. 12 *id.* 343.)

At any rate, the former suit was a bar, if the plaintiff has the right. He had the same rights at the former trial, and they were set off and allowed. (5 *John*. 129.)

Parol evidence was not admissible to contradict the justice's certificate. (5 *John*. 351.)

Curia, per *WOODWORTH, J.* (after stating the facts.) It is urged that, as a guardian had been appointed for the heir of *Hallenbeck*, the plaintiff cannot sustain the action. The plaintiff stands in the relation of trustee, and must, undoubtedly, account with the guardian; but with this,

I apprehend, the defendants have no concern. They are bound to pay the plaintiff in the terms of their covenant.

In point of fact, it appears from the evidence, that the jury did allow, as a set-off to the defendants before the justice, the rent, or a part of the rent, secured by the covenant. But it also appears very satisfactorily, that the covenant was not offered on that trial as a set-off, but to show that *Washburn* could not sustain an action on his account, in as much as the rent was not then payable ; and that the claims of the parties against each other were suspended until the rent became due. The counsel for the defendants, before the justice, moved for a nonsuit, which was denied. After this, the counsel put the covenant in his pocket. The jury retired, and at the request of the justice, he delivered the bond to the constable, who carried it to the jury.

The covenant was not the subject of set-off at law, it not being between the same parties to the suit before the justice. Besides, it was not then broken. The trial was on the 7th of February, 1825 ; and the rent did not fall due till the 14th. And the weight of evidence is, that it was not offered as a set-off. If, notwithstanding this, the jury have arbitrarily allowed it, they have done *Washburn* injustice ; but that is no cause for depriving the plaintiff of his right.

The certificate of the justice states that the defendants, on the trial, claimed to have the rent secured by the covenant allowed to them by the jury in making up their verdict. The defendants in this cause objected to evidence contradicting the certificate in this respect. But it seems to have been admitted, as there is no mention in the case, that the judge allowed the objection.

I incline to think, that the fact stated by the justice, to wit, that the defendants claimed to have the rent allowed them by the jury, is extrajudicial, and regularly no part of his record. It is not the statement of a proceeding, or the evidence ; but rather that the defendants urged, by way of argument, that the rent should be allowed. The certificate of a justice must contain the process, pleadings,

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evidence, verdict and judgment. Beyond these, he is not called on to certify. If he goes farther, his statements conclude no one.

But, on general principles, a legal demand cannot be extinguished in this manner. The defendants might, on the ground now relied upon, have requested the jury to allow them money due on a bond, payable ten years after the trial; and if, unadvisedly, the jury had done so, it would undoubtedly have been good cause to reverse the judgment; but would not bar them of their remedy by action for the same claim, when it should become due. This is founded on the plain principles of reason, and of law. An allowance to a party by way of set-off, is always founded on an existing demand in *præsenti*, and not one that may be claimed in *futuro*.

So far as respects the present action, the recovery before the justice has no operation.

I am therefore of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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AYMAR and Aymar against ASTOR.

Bear skins were received by the master of a vessel to transport from *New-Orleans* to *New-York*, and there to be delivered in good order and condition, *dangers of the seas excepted*.

The skins being damaged by rats, in an action against the owners of the vessel upon the undertaking; held, that evidence of mercantile usage and understanding, at *New Orleans* and *New-York*, that injuries by rats are considered and treated as perils of the sea, was inadmissible.

The master or owners of a vessel transporting goods on the high seas, are not common carriers, within the meaning of the rule, subjecting the latter to all losses or injuries, which arise from any other cause than the act of God, or the enemies of the country. And in an action against the master or owners for loss or damage of goods from any other cause, it should be submitted to the jury, upon the evidence, whether they used ordinary care and diligence.

ON error from the C. P. of *New-York*. Astor brought assumpsit against Aymar and Aymar, in the court below, for the value of certain bear skins, shipped on board the defendants' vessel at *New Orleans*, for *New-York*, but which were destroyed by rats on the voyage.

By the bill of lading, signed by the master, the receipt of the bear skins was acknowledged, to be delivered in

good order and well conditioned to the plaintiff in *New-York*, the dangers of the seas, and of capture, excepted.

When they were delivered in *New-York*, they were damaged by rats; and the parties went into evidence in the court below upon the question whether the vessel was prudently managed for the avoiding of rats, or whether the master had been negligent in that respect.

The defendants offered to prove, that both at *New-Orleans* and *New-York*, damage by rats was considered, and treated by the usage of trade, and merchants, as a peril of the sea. The court below excluded the evidence, and the defendants excepted.

The court charged the jury that the defendants were common carriers, and liable as such for damage done, unless by the act of God; or the perils of the sea, excepted in the bill of lading. That damage by rats was not a peril of the sea. And the defendants excepted.

Verdict and judgment for the plaintiff below.

*D. Lord*, junior, for the plaintiffs in error. The evidence of the mercantile meaning of the words, "perils of the sea," should have been received. (4 *East*, 130. 2 *John. Rep.* 335, 549. 7 *id.* 385. 5 *B. & P.* 213. *Park on Ins.* 44, & seq. *Abbot on Ship.* pt. 3, ch. 4, s. 2.)

It is true, *Hunter v. Potts*, (4 *Campb.* 203,) held that a loss by rats was not a peril of the sea; but that case went on *Rohl v. Parr*, (1 *Esp. Rep.* 445,) which presented a question of fact, and was decided by a jury. *Dale v. Hall*, (1 *Wils.* 281,) is directly opposed to *Ganiques v. Cox*, (1 *Bin.* 592, 598.)

At any rate, the liability of the defendants below should have been put to the jury upon the question of actual negligence.

*D. B. Ogden*, contra, relied on *Rohl v. Parr*, (1 *Esp. Rep.* 445,) *Hunter v. Potts*, (4 *Campb.* 203,) and *Dale v. Hall*, (1 *Wilson*, 281,) as in point for the defendant in error. He also cited *Phil. on Ins.* 251; *Abbot on Ship.* pt. 3, ch. 3, s. 9.

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SAVAGE, Ch. Justice, said, he thought the evidence of mercantile understanding and usage as to the meaning of the words "perils of the sea," should have been received. And he cited and commented upon various authorities as warranting this. (*Anderson v. Pitcher*, 2 B. & P. 164. *Scott v. Bowdillion*, 5 id. 213. *Coit v. Com. Ins. Co.*, 7 John. 389. *Frith v. Barker*, 2 id. 335.)

As to the question of liability, independent of the evidence offered, he said, the terms "perils of the sea," as used in contracts of insurance, do not include those losses which may be prevented by proper care. In a late case, (*Hunter v. Polls*, 4 Campb. 203,) Lord *Ellenborough* decided that a loss arising from rats eating holes in the ship's bottom, is not within the perils insured against by the common form of a policy.

The cases decided against common carriers, are said by Mr. *Phillips*, (*Tr. on Ins.* 250,) not to be applicable in actions depending on the law of marine insurance. The master of a vessel at sea, he does not consider within the term *common carrier*.

It is the duty of the master to take all possible care of the goods on board; and though the master or owners are not liable for injury by a leak in the ship, by tempests, or other accident, (*Abb. on Ship. pt. 3, ch. 3, s. 9*,) yet they are liable, if the leak be occasioned by rats. It was so decided in *Dale v. Hall*, (1 Wils. 281,) which was an action against a hoyman, for so negligently carrying goods, that they were spoiled. It was shown that the injury was occasioned by rats eating a hole in the vessel, and the defendant had a verdict, which the court set aside; *Lee*, C. J. saying, "every thing is negligence in a carrier, which the law does not excuse; and he is answerable for goods the instant he receives them into his custody; and in all events, except they happen to be damaged by the act of God, or the king's enemies, and a promise to carry safely, is a promise to keep safely." Sir *William Jones* says, (*Tr. on Bail.* 105,) "but the true reason of this decision is not mentioned by the reporter. It was, in fact,

at least ordinary negligence to let a rat do such mischief in the vessel."

This case is not supposed by *Phillips* or *Abbott*, (*Tr. on Ship. part 3, ch. 3, s. 9,*) to be inconsistent with the ancient rule, that the master is not liable for such an injury, if he provides against it by taking a cat on board at the commencement of the voyage.

The master of a vessel, I apprehend, is not responsible like a common carrier, for all losses, except they happen by the act of God, or the enemies of the country.

A carrier for hire, ought, by the general rule, to be responsible only for ordinary neglect. (*Jones on Bail. 103.*) The liability did not exist formerly for robbery. That became necessary, to guard against collusion, by the carrier, with robbers. If the same liability attached to the master and owners of a vessel, it was useless to inquire, (as was done in this case in the court below,) whether it was proper for the master to smoke his vessel, to destroy vermin.

The true question to be submitted to the jury was, whether the master had used ordinary care and diligence in carrying the goods in question. Whether a cat is a sufficient precaution against rats; or whether smoking the vessel is the proper and more efficacious remedy against this evil, is a proper subject for the consideration of the jury. Formerly, taking a cat on board, was accounted ordinary diligence, and excused from damages. If subsequent experience has shown a better remedy, it is the duty of masters and owners to adopt it.

WOODWORTH and SUTHERLAND, Js. were of the opinion that the evidence of mercantile usage and understanding, was properly overruled by the court below; but they agreed with the chief justice in his opinion upon the other point.

The judgment was, therefore, reversed, on the ground that the court erred in charging the jury that the defendants below were common carriers, and liable as such.

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Judgment reversed.

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v.  
Union Ins. Co. TREADWELL & THORNE against THE UNION INSURANCE  
COMPANY.

In an action on a policy of insurance upon a cargo, the underwriters may show in their defence, that the vessel had not a competent crew, or a captain or pilot of competent skill. But this is a question of fact to be submitted to a jury, upon the nature of the voyage, &c.

If the vessel become disabled, in such case, the underwriters have a right to claim that the master should procure another vessel to forward the cargo, if in his power.

The rule on this subject is, that if there be a vessel in the port of distress, or in a contiguous

port, the master should procure it.

But where it appeared that resort must have been had to distant places; and, independent of procuring a vessel, there were further serious impediments in the way of putting the cargo on board; held, that the rule was not obligatory.

A cargo was insured at and from *North Carolina* to *New-York*; held, that if the vessel was sea-worthy when she passed the boundary line of *North Carolina*, this was sufficient; and her unsea-worthiness previous to that point of time, would be no defence in an action against the underwriters for a loss.

ASSUMPSIT upon a valued policy of insurance, dated *September 22d*, 1823, on part of 800 bushels of wheat, on board the schooner *Lodge, Farrow*, master, on a voyage at and from *North Carolina* to *New-York*, containing the clause, "the captain at liberty to act as pilot," and the common memorandum, by which, among other things, grain of all kinds is warranted free from average, unless general.

The cause was tried at the *New-York* circuit, *January 31st*, 1825, before EDWARDS, C. Judge.

On the trial, the plaintiffs proved, that on the 13th of *September*, 1823, the schooner sailed with the wheat on board, from *Perquimions* river, at or near the town of *Hertford*, in the state of *North Carolina*, on her voyage for *New-York*; and after experiencing a series of head winds, and, at last, very tempestuous weather, till the 8th of *November*, she was run on shore upon *Cape Hatteras* banks, about 18 miles north of *Cape Hatteras* light house; this being deemed necessary by the master and crew, to save the vessel and cargo from total destruction, and preserve the lives of the crew. In the act of running her on shore, she was so much injured as to be incapable of proceeding on her voyage, and was afterwards sold. The wheat was, in the end, so intermixed with sand and water, as, in the opinion of the master, to be un-

fit for transportation, and was sold at public auction, after full notice by advertisement, for \$70,55½; which, after defraying commissions, expenses, &c. left \$22, afterwards paid to the consignees.

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Verdict for the plaintiffs for the sum insured, with interest, as for a total loss, deducting the net proceeds of the salvage.

A motion was now made in behalf of the defendants, for a new trial, grounded on a very voluminous case, containing the evidence at large, which, so far as it is material, beyond what is above given, will be found stated in the opinion of the court.

*T. A. Emmet*, for the motion, insisted, 1, That the vessel was not sea-worthy, either at the commencement of the risk, or any other time. (1 *Caines' Rep.* 32. *Marsh. on Ins. Cond's ed.* 154, 5, 165 a, n. (16). *id.* 165 b, n. (17). *id.* 166, n. (18). 1 *John. Cas.* 184. 1 *Mass. Rep.* 436. *Phil. on Ins.* 114, 117. *Selv. N. P.* 4 ed. 954, n. (53.)

2. That the master was guilty of so many and great delays in the prosecution of the voyage, as amounted to a deviation.

3. That the voyage was broken up on account of the sale of the cargo, and not from the impossibility of procuring another vessel to send on the cargo to *New-York*; and that such a vessel could easily have been procured. (18 *John.* 210, 11. 14 *John.* 138. 1 *Caines' Rep.* 196. 3 *Caines' Rep.* 108. 1 *John. Cas.* 226. *Cond's Marsh.* 221, 224, 233. 1 *Wheat.* 224. 7 *East*, 38.)

*G. Griffin*, contra. 1. The crew of the vessel was competent for the voyage. (*Park on Ins.* 299, note (a). 2 *Campb.* 235. 3 *Taunt.* 299. 2 *B. & A.* 320. 1 *Caines' Rep.* 217.)

2. There was no deviation, or unnecessary delay. (4 *Rep. Rep.* 25. 2 *Cond's Marsh.* 840, 1, note. 2 *Taunt.* 301.)

3. It was not, under the circumstances, the duty of the master to attempt to forward the cargo to its port of destination, in another vessel; and there was, therefore,

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a loss of the voyage by a peril insured against. (*Park on Ins.* 152, 3, 221. *Phil. on Ins.* 489, 90, and the cases there cited. 12 *John.* 107. 18 *John.* 208.)

Curia, per WOODWORTH, J. Three points are raised by the defendants :

1. That the vessel was not sea worthy ;
2. That the master was guilty of so many and great delays, as amounted to a deviation ;
3. That the voyage was broken up, on account of the state of the cargo ; and not from the impossibility of procuring another vessel, to send on the cargo to *New-York*.

As to the vessel, it is satisfactorily made out, that she was tight, staunch and strong, on the 13th of *September*, 1823. Having received her cargo on board, she sailed on her voyage to *New-York*, down *Perquimons* river, from a place at or near *Hertford*, in the state of *North Carolina*. The crew consisted of the captain, and one hand. On the 16th of *September*, and while the vessel lay in *Cape Hatteras* channel, detained by head winds, the master shipped another hand. It satisfactorily appears that the crew previously on board was competent for river and sound navigation. The weight of evidence is, that three hands were a competent number for the residue of the voyage. Owing to adverse winds, there was great delay, and little progress made ; but there is no ground for believing that reasonable diligence was not used in the prosecution of the voyage. The risk commenced at and from *North Carolina*. If the vessel was seaworthy at the time she passed the boundary line of that state, it is sufficient. The insurers not being responsible for a loss happening previous to her arrival at the point of departure, the inquiry as to her previous seaworthiness, I apprehend, becomes immaterial.

But it is contended that there was not a competent crew, because the master was not acquainted with the science of navigation. This question was not raised at the trial. The attention of neither the judge nor jury was called to the point. It was a question of fact, whether the coasting

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trade could be pursued with safety, without having on board a navigator capable of making an observation to find the latitude. From the finding of the jury, it may be presumed they considered it unnecessary. Had the question been raised at the trial, we cannot say that the plaintiffs might not have given further evidence; and shown that, from the nature of this navigation, the proximity to land, the number of harbors, as well as from other facts, it was consistent with prudence and safety, to dispense with a scientific navigator. It is not, therefore, admissible, to allow the defendants the benefit of this exception now. It should have been made at the trial. *Berrian* testified, that not more than one fourth of the masters of vessels, of the size of the *Lodge*, engaged in this trade, understand the science of navigation; and that that fact is generally known in *New-York*. This, it is true, does not prove a usage, sanctioned by the practice of the community generally; but it goes far to show in what light the practice is considered by mariners and navigators of vessels. That proof of general usage would have been admissible, I think undeniable, provided it had been made out according to the rule in *Smith v. Wright*, (1 *Caines*, 45.) It is there observed, "the true test of commercial usage is, its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it."

If this view be correct, it follows, that a new trial should not be granted, on the ground of an incompetent crew.

But the objection, if made in season, cannot avail. The assured, it is true, cannot recover, unless there be a sufficient crew, and a captain and pilot of competent skill. (7 *T. R.* 160.) But the plaintiffs have very satisfactorily proved the general competency of the master. Several witnesses speak of him as entirely competent for the voyage. If the alleged incompetency is founded on the fact that he was ignorant of navigation, it was incumbent on the defendants to have shown that such ignorance was a disqualification; that it was not considered safe to make the voyage, without having a scientific navigator. No

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such testimony was given. The defendants' witnesses do not give an opinion on this point. They say, they have taken a navigator; but they do not say, it might not be safely dispensed with.

I should not, therefore, be disposed to disturb the verdict, on the evidence stated in the case relative to this ground of the motion.

As to the third question, the general rule is, that when a ship becomes disabled, it is the duty of the master to procure another vessel, if it is in his power; and the insurer is not answerable for his voluntary neglect so to do, unless such neglect is caused by an act of barratry. (9 *John*. 21.) What may be done, ought to be done, when the rights of third persons are essentially concerned in the act. This general rule, however, is restricted to reasonable limits. The circumstances of each particular case must be considered. From them it must be determined, whether the difficulties in the way were so great as to form an excuse for not sending on the cargo. In the case of *Saltus v. The Ocean Insurance Company*, (12 *John*. 107,) it was decided that the master was not bound to seek a vessel, out of the port of distress, or out of a port immediately contiguous. In that case, there were a number of vessels at *Cork*, 16 miles distant, which the master supposed might have been obtained; but he made no attempt to procure them. The question resolves itself into this; not whether a master, by going to a distant port or place, might have procured another vessel; nor, whether by first conveying the cargo some distance over land, it was possible to effect a re-shipment; but whether, under the circumstances in which he was placed, the law required him to make the attempt. Some certain rule, to govern the discretion of the master, is desirable, wherever practicable. Although no general rule will govern every case, the approach to certainty will be considered beneficial to all parties. I think, then, the rule laid down in the last case is at once safe and reasonable. If there be a vessel in the same port, or a contiguous port, which is substantially

the same thing, his duty is clear. The rule is imperative. But where resort must be had to distant places, and, independent of procuring a vessel, there are further serious impediments in the way of putting the cargo on board, the rule is not obligatory.

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In the present instance, the vessel was wrecked, and lying on the beach. There was no port within a number of miles. A vessel could not come along side, for the purpose of re-shipment. In the first place, the wheat must have been carted across the beach. After that had been done, it appears from the evidence, boats would have been necessary to carry it to the vessel, a distance of several miles, it not being practicable to approach the shore. The conveyance in boats would have been attended with danger: in a calm, with but little; but if a gale had come on, with almost certain destruction. Must this labor and hazard be incurred to make the underwriter liable? The master was not bound to transport the wheat by land; and then incur the risk of sending it in boats to the vessel. I think the application of so severe a principle unreasonable in itself; and not called for, in order to enforce, in good faith, the execution of the contract. The master, under the circumstances, was justified in not making an attempt to procure a vessel. The insurer has no cause for complaint. An event happened beyond the control of all parties, which, in the given case, denies to the defendants the right of insisting on a re-shipment.

I am of opinion, that the motion for a new trial be denied.

New trial denied.

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Minklaer
v.
Rockfeller.

MINKLAER *against* ROCKFELLER and FELLER.

ON error from the C. P. of *Columbia*. *Minklaer* sued *R. & F.* before a justice, in case, for neglect of duty as overseers of the poor of the town of *Clermont*, in not providing for *John M'Gill* and his wife, two paupers belonging to that town. The cause went to the C. P. by appeal; who non-suited the plaintiff upon the following proof:

On the 25th of *January*, 1823, the plaintiff served a written notice, signed by himself, on the defendants, that *John M'Gill* and his wife were at his house, wholly unable to provide for and maintain themselves; and requiring the defendants to make provision for them. The defendants said they could do nothing about it till they saw Mr. *Edward P. Livingston*. They admitted that they were then, and still continued to be, at the time of the trial in the C. P., overseers of the poor of the town of *Clermont*; and that *M'Gill* and his wife were legally settled in the town. They were poor and helpless. The plaintiff had supported the paupers for a considerable time after the

The appropriate remedy is by mandamus, in behalf of the pauper, to compel the overseers to apply to a justice, and cause the case to be considered.

To the opinion of the C. P., nonsuiting the plaintiff, he excepted.

K. Miller, for the plaintiff in error. The defendants had omitted to perform a known official duty; and were therefore liable to a special action on the case. They

Semble, that, if an action would lie, it must be in the name of the pauper. In an action against public officers for a non-feasance, the plaintiff must show the neglect of duty, by proof on his part; and if an action would lie against overseers of the poor, for not taking the proper steps to obtain an order for the relief of a pauper, the onus of showing the neglect lies with the plaintiff. It is not enough that he shows it to be their duty; but he must show the negative, that they did not do their duty.

were under both a legal and moral obligation to support the paupers. It was their duty to inquire into the matter, and furnish relief, according to the statute, (1 R. L. 287, 8, s. 25.) This was held in *King v. Butler*, (15 John. 281-2.) The statute requires that, when application is made to the overseers, they shall make application to a justice, and with him inquire into the state and circumstances of the pauper; and the justice is to make an order for relief, if it shall appear to be necessary. The case cited, holds that this application for an order is merely to protect or indemnify the overseer against the advance of money for relief. *Platt, J.* in *Olney v. Wickes*, (18 John. 126,) entertains this view of it.

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An action is the only possible remedy which the plaintiff can have for the injury. A motion might, in the first instance, have been made for a mandamus; but that will not now reach the injury which has happened. He could not go to the sessions by appeal, because the overseers refused to apply for the order of a magistrate. Without his application, no order could be made, one way or the other. A mandamus could not have been obtained till the term next after notice to the defendants; and we should, of necessity, have been put to this remedy for our damages in the mean time.

J. W. Wheeler, contra. This case does not come within the authorities, or the principle relied on. Overseers have never been holden liable without an express promise, or an order of a magistrate previously obtained. Till one or the other takes place, there is no legal duty for the overseer to perform. No action lies, therefore, either at the common law, or upon the statute. Is it to be tolerated, that persons holding the office of overseers of the poor, shall be bound to accept a pauper upon the complaint of any one who may choose to interfere; and that too, upon the penalty of answering to him in a suit, the sums he may think proper to expend for maintenance, in case of refusal? The plaintiff had no rights. But if his right was perfect, the proof of misconduct was altogether deficient. It

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is not enough to show a mere omission of duty. It should be accompanied with an intention to harrass and vex the plaintiff. (*Rogers v. Brewster*, 5 John. 125.) Malice or corruption should have been shown. (*Jenkins v. Waldron*, 11 John. Rep. 114.) The statute points out the duty of the overseer; but gives no remedy. The only remedy is by mandamus; or in case of a corrupt refusal, an indictment. Overseers are a *quasi* corporation. (*Todd v. Birdsall*, 1 Cowen, 260.) As such, they are not liable, except where the statute has made them so. They cannot act independent of the magistrate; and whether they will act with him, is a matter in their discretion. It would be singular, that they should be made liable for a mere error in judgment. (*Seaman v. Patten*, 2 Caines, 312. *Harman v. Tappenden*, 1 East, 561.)

Miller, in reply, denied that overseers have a discretion upon the question of acting. The statute is peremptory that they shall apply to a magistrate. So far their duty is ministerial. The judgment which they give with the magistrate, is another consideration. The cases cited against the plaintiff are of officers having discretion. The defendants should have shown they had done their duty as far as they could.

Curia, per SUTHERLAND, J. The bill of exceptions presents the question, whether an action on the case will lie against overseers of the poor, for omitting or refusing to take the necessary measures to provide for paupers, in favor of an individual, who, from motives of humanity, furnishes them with the sustenance and attention, which their situation absolutely requires.

The declaration does not aver that the defendants acted fraudulently or maliciously; and there is no evidence that their neglect was wilful, and without reasonable excuse, except what is to be inferred from their admission, that *M'Gill* and his wife were paupers, legally settled in the town of *Clermont*. The evidence before the justice consisted principally of the admissions of the parties; and

his return is not sufficiently full and explicit, to show the bearing and pertinency of much of the evidence. But I think it is fairly to be inferred from the whole evidence, that the defendants did not intend to admit that the town of *Clermont* was bound to maintain these paupers. When the notice was served on them, they said they could do nothing about it, until they saw Mr. *Edward P. Livingston*; and the return states that the defendants introduced and proved two written agreements between *E. P. Livingston* and his wife, and *Adam Minklaer*, junior; and also a bill of sale or agreement between *John M'Gill* and the plaintiff. The plaintiff introduced and proved three receipts given by *E. P. Livingston*; two to the plaintiff, and one to *John M'Gill*. The defendants proved an assignment or surrender, under seal, from *John M'Gill* to *E. P. Livingston*.

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From this evidence, it is probable, that *M'Gill* had been a slave; and that, in the opinion of the overseers, it was doubtful whether he had been so manumitted as to exonerate his master from the responsibility of maintaining him. This, however, is mere conjecture; and none of this evidence was given in the court of common pleas. All the evidence there, consisted in proof of the notice given to the defendants; their declaration that they could do nothing about it until they saw Mr. *Livingston*; their admission that they were overseers of the poor of *Clermont*; that *M'Gill* and his wife were legally settled in *Clermont*; and proof that they were unable to maintain themselves; that the plaintiff had provided for, and kept them; and the value of the services, &c. rendered by him.

This evidence was clearly insufficient to entitle the plaintiff to recover. The defendants were not bound, nor had they any authority to make provision for the paupers in the first instance. All they could do, was, to apply to a justice of the peace, and, together with him, inquire into the state and circumstances of the persons asking relief; and if it should appear that they were in such indigent circumstances as to require the relief sought, then the justice was bound to give an order in writing to provide for them.

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Until such order was given, the defendants had no authority to make any provision.

If they were guilty of any omission of duty, it was in not making the application to a justice, and, together with him, making the necessary inquiry.

But, for aught that appears, all this may have been done : and the justice may have refused an order. When the plaintiff seeks to charge the defendants as public officers, for an omission of duty, he is bound to prove it affirmatively and clearly. (11 *John.* 114. 2 *Mass. Rep.* 243. 3 *Caines*, 317, *per Livingston*, J.) That, I think, in this instance, has not been done.

But, admitting that the defendants refused to take the necessary measures to obtain the order, are they responsible to the plaintiff, in an action on the case, for the trouble and expense of supporting and taking care of the paupers while they remained in his house ?

I do not see on what legal principle the action can be sustained. The plaintiff was under no legal obligation to take care of the paupers. It was a commendable humane act, undoubtedly : but it must be considered voluntary on his part, and cannot lay the foundation of an action against the overseers of the poor. Damage to the plaintiff was not the necessary or legal consequence of the non-feasance of the defendants ; the proper, and for aught that I perceive, the only course to be pursued, when the overseer refuses to act in a case like this, is, to apply to this court in behalf of the paupers for a mandamus. It is true that the paupers must be supported by some one pending the application ; and that the mandamus would afford no means of re-imbursement. I see no remedy for this, unless the legislature should think proper to interfere, and make the overseers responsible upon an implied assumpsit for necessary expenditures in support of paupers, chargeable upon their respective towns. It appears to me, that if an action would lie at all, it must be in the name of the paupers themselves.(a)

*King v. Butler*, (15 *John.* 281,) and *Olney v. Wickes*, (18 *John.* 122,) have no application to this case. They

(a) Vid. 5 *Cowen*, 666, *per Spencer*, Senator.



merely decide that an overseer of the poor may bind himself, in his individual capacity, by an express promise to pay for the maintenance of a pauper.

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Judgment affirmed. (b)

(b) *Vid. Gourley v. Allen*, (5 Cowen, 644,) and *Flower v. Allen*, (id. 654.)

JACKSON, *ex dem.* Smith, *against* MARSH.

EJECTMENT, tried at the *Cayuga* circuit, *March 10th*, 1825, before THROOP, C. Judge; when a verdict was taken for the plaintiff, subject to the opinion of the court.

*D. Cady*, for the plaintiff.

*B. F. Butler*, for the defendant.

*Curia, per* WOODWORTH, J. The plaintiff gave in evidence at the trial, a patent to the lessor of the plaintiff, dated the 16th of *June*, 1823, for subdivision no. 2; beginning at the *south east* corner of the survey 50 acres: from thence giving certain courses and distances, and including 135 acres.

The case states, that the action was brought to recover subdivision no. 2, in lot no. 50, in the township of *Sem-*

A patent of lands, by the state, shall be presumed to have issued regularly; and, if it be not void on its face, cannot be avoided collaterally, in a suit between individuals, unless it is issued without authority, or against the prohibition of a statute.

Thus, where a patent issued in 1823, for lands which were occupied and improved,

to the value of \$25 on the 17th of *February*, 1809; *held*, that it should be presumed, that satisfactory proof was produced to the commissioners of the land office, that the occupant had been satisfied for his improvements, previous to the date of the patent, pursuant to the statute, (1 R. L. 296, 7, s. 17.)

A patent was granted of subdivision no. 2, beginning at the *south east* corner of the survey 50 acres; and then giving courses and distances which would not include subdivision no. 2, but the whole, or greater part of subdivision no. 4; whereas, had it begun at the *north east* corner of the survey 50 acres, the same courses and distances would have included subdivision no. 2. The subdivisions had, before the grant, been surveyed, and a map made, and filed in the office of the surveyor general; according to which, subdivision no. 2 began at the *north east* corner of the survey 50 acres, whence the courses and distances mentioned in the patent, were laid down, and would include subdivision no. 2. *Held*, that the word "*south east*" should be rejected as surplusage, and that the location upon the map should control.

If there are certain particulars sufficiently ascertained in the description of parcels, in a patent or deed, which designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the grant.

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*pronius*; and that the defendant was in possession. It appeared by a map and certificate of the surveyor general, admitted as evidence, that lot no. 50 had been subdivided into several lots, of which lot no. 2 was one; that the map had been filed in his office; and that subdivision no. 2, as represented on the map, was, on the 23d of March, 1818, sold to the lessor by the surveyor general, acting on behalf of the state.

By the act of 1813, concerning the commissioners of the land office, (1 R. L. 296, s. 17,) it is declared, that if any tract of land sold under the act, was occupied and improved on the 17th of February, 1809, to the value of \$25, the occupant of such improvement shall be entitled to recover the value thereof from the purchaser; and the commissioners of the land office are inhibited from causing letters patent to be issued, until satisfactory proof be produced, that the purchaser has satisfied the occupant for his improvements.

In this case, it appears that a contract, under which the defendant claims, was given for 50 acres, being a part of subdivision no. 2; and that before February 17, 1809, 15 acres of the 50 were cleared, and 6 acres chopped, the value of such improvements exceeding \$25.

The patent is evidence of the plaintiff's right, until set aside or vacated. The inhibition in the act is not against the issuing of any patent; but against issuing until satisfactory proof be produced, that the purchaser has satisfied the occupant. We are authorized to presume, *omnia solemniter acta*, that public officers, to whom the government committed important trusts, had discharged their duty faithfully; and received the necessary proof, before the patent issued. No evidence was offered that the requisite proof was not produced to the commissioners. The question is, therefore, not raised, whether an inquiry of this kind was admissible on the trial. But if the question had been presented, I think the doctrine contained in the case of *Jackson v. Lawton*, (10 John. 23,) decisive: "If the patent was issued by mistake, or upon false suggestion, it is voidable only; and unless letters patent are absolute-

ly void on the face of them ; or the issuing of them was without authority, or prohibited by statute, they can only be avoided in a regular course of pleading." And again : "When the defect arises on circumstances *dehors* the grant, the grant is voidable only by suit. It would be against precedent, and of dangerous consequence, to permit letters patent to be impeached collaterally."

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The material question is, whether the letters patent include lot no. 2. This is an evident mistake in the boundaries. Lot no. 2 begins at the *north east* corner of the survey 50 acres. The description in the patent is, "Beginning at the *south east* corner."

If the map is rejected, as the counsel for the defendant contends, there is no difficulty in the case ; for then it would not appear there was any misdescription. It would be intended, that the boundaries in the patent were a correct description of no. 2. But the map, by agreement, forms part of the case. By that, it appears that lot no. 2 begins at the *north east* corner of the 50 acre survey. The residue of the boundaries correspond with the description in the patent. By beginning at the *south east* corner, lot no. 2 will not be included ; but the whole or greater part of lot no. 4. The location of no. 2. is equally certain, as the *south east* corner of survey 50 acres. Both are established by the production of the map. It is, therefore, doing no violence, to reject that part of the description, which commences at the *south east* corner, and give effect to another part, to which equal certainty is attached ; when it is manifest by so doing, full and fair effect is given to the intention of the parties. In truth, here is a direct contradiction. When the patent grants subdivision no. 2, it conveys that lot according to its real boundaries. By the map, it appears that the place of beginning is at the *north east* corner of the survey 50. From the patent, and the map taken together, it may be affirmed, that no. 2 begins at the *north east* corner. After this, follow the boundaries of no. 2, as described in the patent, which makes the place of beginning the *south east* corner. The rule to be applied is, "If there are certain particulars suf-

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sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." (*Jackson v. Clark*, 7 John. 223.) From the principles adverted to, I think the place of beginning, as described in the patent, may be rejected as surplusage; the description of the premises being sufficiently certain without those words. This was done in *Jackson v. Loomis*, (18 John. 81,) afterwards affirmed on error, (19 John. 449.) In the case of *Worthington v. Hylyer*, (4 Mass. Rep. 196,) the same doctrine is laid down by Parsons, C. J., who observed, that "If the description be sufficient to ascertain the estate intended to be conveyed, although the estate did not agree to some particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected."

My opinion is, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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### WILDER and HASTINGS, *qui tam*, &c. against WINNE and I. FONDEY.

DEBT, for the penalty of \$12,000, upon the 4th section of the statute for the prevention of frauds, (sess. 10, ch. 44, 1 R. L. 76,) tried at the Albany circuit, in September, 1825, before DUER, C. Judge.

The declaration stated, that the plaintiffs sued one Stephen Fonday, for a debt due to them, on the 15th day of October, 1823, in this court; and at February term, 1824, S. obtained judgment for \$542,97. That at the time of commencing the suit, and until the 3d of February, 1824, S. Fonday possessed and owned divers goods and chattels of different kinds, specifying them, at Geneva, of the value of \$6,000, which were liable to the plaintiffs' execution.

and the plaintiff is not, therefore, liable to the penalty imposed (1 R. L. 76, 7.)

If a judgment be valid in its concoction, i. e. bona fide, and upon sufficient consideration, though execution be taken out and enforced with a view to delay and hinder creditors, and it have that effect, yet it is not fraudulent within the statute.

to prefer one creditor to another, or otherwise.

But that in the previous term of *October*, 1823, the defendants entered up a judgment, by confession, in this court, against *S. Fondey*, for \$12,014 45, debt and costs.

The first count then charged that this last judgment was devised, &c. between the parties, of fraud, &c. to delay, hinder and defraud the plaintiffs of their action, demand and damages, &c. ; and that the defendants, on the 3d of *January*, 1824, &c. put in use the judgment, as true and simple, &c.

The second count was the same in substance, with the addition, that the defendants, on the 1st of *November*, 1823, sued out a *test. fi. fa.* on their judgment, endorsed for \$6017, 48, with interest, &c. ; that on the 23d of *January*, 1824, the sheriff seized the goods of *S. Fondey*, and sold them at auction ; and that this execution was devised and contrived, &c. and put in use, &c. (*as before of the judgment.*)

The judgments, the execution and levy, as set forth in the declaration, were proved on the trial ; and it appeared that the defendants' execution, having a preference over one issued on the plaintiffs' judgment, the latter was returned *nulla bona*. It also appeared that the defendants' judgment was entered after *S. Fondey* had become insolvent.

The evidence was very satisfactory that the judgment of the defendants was *bona fide* ; and that no part of it was paid when the execution issued.

It farther appeared, that the sale of *S. Fondey's* goods, on the execution, which was made at *Geneva*, (*Ontario county*), *January 30th*, 1824, amounted to about \$980 ; the property being chiefly bid in for the defendants. That after this sale, the defendants, by a re-sale of the goods, and otherwise, received enough and more than enough of *S. Fondey*, to satisfy their judgment ; while the other creditors of *S. Fondey* got nothing. That the goods purchased in by the defendants at *Geneva*, were sent to *Albany* ; and on a re-sale at auction, brought \$1573,45. That a small part of the defendants' judgment was to secure future advances.

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Various circumstances were given in evidence as to the manner in which the sale was conducted, and how the defendants afterwards obtained satisfaction of their judgment, which it is not material to state, as the decision of the cause here turned on the charge of the judge.

He recapitulated the evidence to the jury, and charged strongly in favor of the *bona fides* of the defendants' judgment. He told the jury that the object of the statute was to punish frauds, committed to delay and hinder creditors' recovering their just debts, and that such fraud might have been committed by a fraudulent use of the defendants' judgment against *S. Fondy*, to delay and hinder creditors, &c. admitting the judgment was legal. Hence, the intent of the defendants in enforcing their judgment, was a material question to be decided by the jury; for their liability depended on the fact of their being actuated by a fraudulent intent. This was required to be satisfactorily made out, before the defendants could be charged with the heavy penalty demanded of them. That if the jury thought there was room for a reasonable doubt whether the defendants intended to commit a fraud against the creditors of *S. Fondy*, they ought to find a verdict in their favor; but if they were satisfied that the defendants did intend to commit such fraud, they should find for the plaintiffs.

The jury found for the plaintiffs.

*A. Van Vechten*, for the defendants, now moved for a new trial, on the ground (among others) that the judge mis-directed the jury.

*S. A. Foot*, contra.

*Curia*, per SAVAGE, Ch. Justice. It is contended that the judge erred in stating to the jury, that the defendants could commit a fraud upon the creditors of *S. Fondy*, although their judgment was legal; and that the statute is applicable to those bonds, judgments, &c. only, which were fraudulent in their original concoction.

I cannot find any adjudged case in this court, where the subject in question has been considered or decided. The

English statute of 13 *Eliz. ch. 5*, is substantially like ours. That act was passed for the avoiding of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, devised to the intent to hinder, delay or defraud creditors and others of their just and lawful actions : and enacts that all and every feoffment, &c. and every bond, suit, judgment and execution, for any intent or purpose before declared, shall be utterly void. It also, like our statute, gives an action *qui tam*. The same principles must, of course, be applicable to both statutes.

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The case of *Holbird v. Anderson*, (5 *T. R.* 235,) was not an action for a penalty, but it involved the inquiry as to what acts are void as being fraudulent within the 13 *Eliz.* The facts were, that one *Shepherd* had a judgment against *Charter*, who was also indebted to *Holbird*, the plaintiff. *Charter*, knowing that execution was about to issue on *Shepherd's* judgment, confessed a judgment to the plaintiff, on which execution was delivered to the sheriff, two hours before *Shepherd's*. The sheriff levied upon *Shepherd's* execution, and returned the plaintiff's *nulla bona* ; upon which he brought an action for a false return. It was contended for the defendant, that the warrant of attorney to confess judgment was void by the statute ; being with intent to hinder or delay *Shepherd's* execution. Lord *Kenyon* said, there was no fraud in the case. The plaintiff was preferred by his debtor, not to benefit the latter, but to secure the payment of a just debt, in which he could see no illegality or injustice. The warrant of attorney, he adds, was given upon good consideration ; and the words *bona fide*, in the act, only apply to cases where possession is not delivered, or where it is merely colorable. *Buller*, J. alluded to the case of executors, who confess judgments to some creditors, after suits against them by others, and which judgments cover all the assets.

It is perfectly well settled in this state, as it is also in *England*, in cases not coming within the bankrupt acts of that country, that a debtor, in failing circumstances, may prefer one creditor or set of creditors ; and this may be

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done by assignment, judgment, or otherwise ; and such assignment or judgment is not fraudulent, unless it be intended, in whole or in part, for the future benefit of the debtor. (5 *T. R.* 235, 424, 530. 8 *id.* 528. 2 *John. Ch. Rep.* 306, 7. 3 *id.* 446, 453.) In the late case of *Mackie & Cairns*, (5 *Coven*, 547,) in the court for the correction of errors, this doctrine was fully considered and recognized. The authorities cited from the *English Term Reports* and *Johnson's Chancery Reports*, also show that a security to indemnify for future advances is valid.

If, therefore, the fact be admitted, that the bond on which the judgment of the defendants was entered, was executed as a collateral security for goods, for liabilities, and for contemplated future advances, surely it was free from any suspicion of fraud. The judgment was entered after the failure of *S. Fondy* was known ; and the execution was issued purposely to obtain payment in preference to other creditors. Undoubtedly it had the effect to delay or hinder the plaintiffs in the collection of their demand. Every assignment or preference given by a failing debtor, has that effect as to the creditors who are not preferred.

It then becomes necessary to enquire whether the issuing of an execution upon a valid judgment, done to defeat other creditors, renders the plaintiffs in the judgment liable to the penalty in the 4th section of the statute for the prevention of frauds. The case of *Meux, qui tam, v. Howell*, (4 *East*, 1,) is full to this point. That was an action on the statute, (13 *Eliz. ch.* 5, s. 3,) from which our 4th section, (1 *R. L.* 76,) was in substance taken. Many of the expressions are precisely the same in both. The declaration charged the defendants with putting in use a fraudulent judgment against *J. Norton*, the plaintiffs being his creditors, *contra formam statuti*. The plaintiffs were landlords of *Norton*, and had distrained for rent. They had also an account against him for beer. The defendants, being also his creditors, sued him, and he was surrendered by his bail. They finally took from him a judgment for the benefit of all the creditors. Execution



was issued, and *Norton's* goods sold. A tender was made to the plaintiffs as for their rent ; but they would not receive it, being less than the rent distrained for. The question upon the argument was, whether the judgment against *Norton* was not, under these circumstances, fraudulent within the statute. Lord *Ellenborough* said, "it is not every feoffment, judgment, &c. which will have the effect of delaying or hindering creditors of their debts, that is, therefore, fraudulent within the statute ; for such is the effect, *pro tanto*, of every assignment that can be made by any one who has creditors. Every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c. must be devised of malice, fraud, &c." In conclusion, he said, "unless we were to go the length of saying, that every assignment to a creditor is fraudulent as to the rest of his creditors, and prohibited to be made, this was not fraudulent. It has none of the qualities of fraud within the act, which was meant to prevent deeds, &c. fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors." *Grose*, J. remarked, if the judgment be given *bona fide*, and upon good consideration, it is not within the act.

In that case, it was admitted that the distress was not affected by the execution, and Lord *Ellenborough* observed, that, as to the plaintiffs' book debt, they had taken no inchoate steps to recover it. In that respect, the case now before the court, differs from *Meux, q. t. v. Howell*. So far, the claim of *Meux* was weaker than that of the present plaintiffs. But, in this very particular, the case of *Holbird v. Anderson*, was much stronger with the plaintiff than the present.

After a full examination of this case, I am satisfied of the correctness of the general proposition, that if a judgment, &c. be *bona fide* in its concoction, and upon good consideration, it is not within the act for the prevention of frauds.

We are not called upon to say what remedy the plaintiffs may have against the defendants, for the property or

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money in their hands belonging to *S. Fondey*. It is sufficient for us to say, that, in our opinion, the defendants are not liable in this action, if the judgment was *bona fide*, and upon good consideration. If the facts stated in the case be undisputed; that it was given to secure a debt due to the defendants, and to indemnify them against their advances and liabilities, the judgment was not fraudulent. There are good and legal considerations to support it.

I may be allowed to express my regret, with the late chancellor *Kent*, that such preferences are allowed to failing debtors; but the law is too well settled to be altered by any thing but legislative enactment.

In my opinion it was incorrect, to leave to the jury to decide upon the intent with which the execution was issued. It must necessarily have been to delay the plaintiffs; the property not being sufficient to pay both.

A new trial should, therefore, be granted, with costs to abide the event.

New trial granted.

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THE PEOPLE *against* BARTOW.

In declaring on the 1st and 2d section of the statute, (sess. 41, ch. 236,) against unlicensed ON demurrer to the declaration. This was in debt for \$2,000. The first count recited the statute passed April 21st, 1818, which enacted, that it should not be lawful for any person, association of persons, or body corporate, from bankers, it is sufficient to set forth the act so far as it relates to the offence charged, and then to describe the offence according to the statute, averring that, by force of the statute, the defendant forfeited, &c. and an action arose, &c. without saying, "contrary to the form of the statute."

An individual keeping an office of deposit for the purpose of discounting notes, is an offender within the act, though the office be not for the purpose of any other banking operation.

An individual, keeping an office for carrying on any single banking operation, is within the act. It is not necessary, to subject him to the penalty, that it should be for carrying on banking business generally, or in more than one branch.

A declaration under the act, that the defendant kept an office of deposit for the purpose of carrying on banking business and operations, without saying what, is not too general, as it follows the words of the statute.

A declaration on a penal statute creating an offence unknown to the common law, and giving an action, should, in some way, show an offence against the statute; but it is not always necessary to say *contra formam statuti*. It is enough that the offence appear to be, in truth, against the statute.

On a demurrer to the whole declaration, if either count be good, judgment will be for the plaintiff on that count, though the other counts be bad.

and after the first day of *August* then next, to keep any office of deposit for the purpose of discounting promissory notes, or for carrying on any kind of banking business or operations, which incorporated banks are authorized by law to carry on ; unless thereunto specially authorized by law. And that in case any person, or persons, or body corporate, should contravene the foregoing provisions, every such person or persons, and the members of every such corporation, who should, either directly or indirectly, assent thereto, should, for every offence, forfeit the sum of \$1,000, to be sued for, &c. and recovered in an action of debt, in the name of the people. This count then alleged that the defendant, not regarding the act, nor the provisions therein contained, after, &c. to wit, on the 1st day of *April*, 1825, at, &c. did keep an office of deposit, for the purpose of discounting promissory notes, he not being thereunto specially authorized by law ; whereby, &c. by force of the statute in this case made and provided, the defendant forfeited \$1000 ; and, by force of the statute, an action hath accrued, &c.

The second count stated, that after, &c. to wit, on the 1st day of *April*, 1825, at, &c. the defendant, not regarding the act, nor the provisions therein contained, did keep an office of deposit, for the purpose of carrying on banking business and operations, which incorporated banks are authorized by law to carry on, he not being thereunto specially authorized by law. Whereby, &c. (*as before.*)

General demurrer and joinder.

*S. A. Foot*, in support of the demurrer. The first count is defective, in not alleging that the defendant has contravened all the provisions contained in the 1st section of the act, (*sess. 41, ch. 236, s. 1, 2.*) The same objection applies to the 2d count. The words in the second section are not the foregoing provisions, or any of them. The crime charged, is keeping an office only. To warrant the action, all the provisions, and each of them, must be violated. Otherwise the act must be extended by construction which cannot be of a penal statute. Any man has a right

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to keep an object of discount and deposit. The only object of the act was to restrain companies not incorporated, from carrying on banking operations.

The offence is not alleged in either count, to have been committed *against the form of the statute*. Such an averment is material in an action for a penalty given by statute. A general demurrer is sufficient to reach this defect. In a penal action, a general demurrer is equivalent to a special one in any other. The defect is fatal even after verdict. (1 *Chit. Pl.* 358. *Lee v. Clarke*, 2 *East*, 353.)

The second count is also bad for want of sufficient precision and certainty. It does not specify what kind of banking business or operations it was the purpose of the defendant to carry on.

*Talcott*, (attorney general) contra. The language of the statute is too plain to be mistaken. An individual can carry on no kind of banking business or operations. According to the construction contended for on the other side, any kind of banking business may be carried on, if all are not joined, and this too by a company. The object was to prevent every species of imposition which had so long been practised upon the community by private banks. Yet, within the rule set up against us, three individuals, by dividing their operations, may violate all the provisions of the statute. If they do not go to work as a company, it is enough. They escape. One may keep an office of deposit; another issue notes; and a third discount. No. The true sense of the act is distributive. It reaches any separate kind of banking business. The intention of the legislature should be consulted. (*Bac. Abr. Statute*, (1) pl. 9, and the cases there cited.)

As to the formal objection, *Lee v. Clarke* is itself against the plaintiff. The only difficulty in that case, arose from the circumstance that there were two different statutes. This will be seen by adverting to the opinion of the court, and the cases cited in the course of the discussion.

The attorney general also cited to this point, *Esp. on Penal Actions*, 107-8; 2 *Salk.* 504; and *Reynolds*, q. t. v.

*Smith*, (2 *Browne's Penn. Rep.* 257, 260,) which was a much stronger case for the defendant than the present one, the statute neither being recited in the declaration, nor the general conclusion inserted, *contra formam*, &c. Yet a motion in arrest was denied. It was held enough, that the declaration brought the defendant within the act by the description of the offence.

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*Foot*, in reply, said, if the construction contended for by the attorney general, was the correct one, the statute might be extended to 20 or 30 different branches of business, very usually and generally carried on in community by individuals and mercantile houses. The words, *any kind of banking business or operations*, would reach almost the whole of the commercial world.

*Curia*, per *WOODWORTH, J.* It is objected that the first count is defective, for two reasons; 1. Because it does not appear that the defendant has contravened all the provisions in the first section of the act; 2. Because the offence charged is not alleged to have been committed against the form of the statute.

As to the first, it may be observed, that although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled, that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction. (6 *Bac. Abr.* 391.) When it is considered that this statute was intended to strike at an existing evil, deemed to be of serious injury to the community, it cannot well be doubted that its enactment was to promote the public good.

Applying these rules to the construction of the act, I apprehend the intention not to be mistaken. It is evident, from the first part of the section, that all banking operations are prohibited. To keep an office of deposit, for the purpose of discounting notes, is a specific violation of the statute. It next forbids the carrying on of any kind of banking business. The latter may include, but is cer-

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tainly more extensive than the former. There are operations of a bank other than the mere discounting of notes. The penalty attaches upon every person who contravenes the foregoing provisions. To allow the construction contended for by the defendant, would be to render the statute a dead letter. The discounting of notes, is, undoubtedly, the principal business of a banking institution. If, in addition to this, it must be shown that the defendant has conducted other and further operations incident to banking, before he is liable to the penalty, the act becomes nugatory and inoperative. On this ground, it is only necessary for a party to confine himself strictly to the keeping of an office for discounting notes, the great evil intended to be remedied, and he is sure then not to be reached. He is excused, because he has not also conducted some of the minor operations of a bank, distinct from the discounting of notes. The statute speaks a different language. It must, I think, be understood to attach, whenever either of the prohibitions have been violated. This is the manifest construction, although the words, "or either of them," are omitted.

As to the second objection, it seems to be generally necessary, in an action on a penal statute, where the act prohibited was not an offence at the common law, to allege in the declaration, that it was done "against the form of the statute." Stating merely, that by force of the statute, an action accrued, is not sufficient. (*Lee v. Clark*, 2 East, 333. 1 Chit. Pl. 353. In *Lee v. Clark*, the action was debt for a penalty on the game laws. The declaration did not set out the statute, or show that the acts done were prohibited by it, otherwise than by averring that the defendant had not lawful authority; whereby, and by force of the statute, an action accrued. It was held that the omission to say, *against the form of the statute*, was fatal. But the same case seems to admit, that the omission of these words may be supplied. Lord *Ellenborough* observed, "the fact must be alleged to be done against the form of the statute. I do not see such circumstances stated, as brings the case within any of them,

without alleging it to be against the form of the statute." *Lawrence*, J. inclined to the sufficiency of an allegation, "by force of the statute, an action hath accrued." On a subsequent day, the court commented on the case of *Coundell or Kendell v. John*, (2 *Salk.* 505, *Holt's Rep.* 632, 5, and *Fortes.* 225, *S. C.*,) which was supposed by the counsel to decide that such an averment was unnecessary. Lord *Ellenborough* remarked, that upon comparing the case with other authorities, there did not appear to be that incongruity which the court at first apprehended. That the different reports of that case concur substantially in this: that it is not necessary to conclude *contra formam statuti*; but, in the language of *Holt*, C. J. "you must bring yourself within the description of it." I think it appears that the court, in *Lee v. Clarke*, acquiesced in this distinction. It was observed by Lord *Ellenborough*, with respect to the case of *Kendall v. John*, that the ultimate opinion of the court was, that in all actions founded on a statute, it is necessary, in some manner, to show that the offence on which you proceed, is an offence against the statute. This principle, which I think sound, disposes of the objection; for here it is clearly shown that the statute prohibits the keeping of an office for discounting notes; and that the defendant did keep such office. Independent, therefore, of the words insisted on as necessary, the offence appears to be against the statute.

The plaintiffs are, therefore, entitled to judgment, even if the second count be defective, the demurrer being general to the whole declaration. On such a demurrer, if either count be sufficient, the plaintiff will be entitled to judgment upon it. (1 *Chit. Pl.* 643. 1 *Saund.* 286, n. (9.) 2 *id.* 379, n. (14.)

But I think the second count also good. It is contended that this count does not specify what kind of banking business the defendant intended to carry on. The declaration alleges that an office of deposit was kept for the purpose of carrying on such business. The penalty is incurred, if an office of deposit is kept, and the purpose, or intent, be made out. The defendant must come prepared

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to defend himself against the intent of doing any act, which may be considered as constituting banking business. The statute does not require a specification. The allegation, although general, is not more so than the statute.

The demurrer not being well taken to either count, the plaintiffs are entitled to judgment. But the defendant may withdraw his demurrer, and plead, on payment of costs.

Rule accordingly.

NORTHROP *against* NORTHROP.

Where the defendant covenanted with the plaintiff to pay certain money to T. on a certain day; and the plaintiff covenanted that on the defendant's so paying, he, the plaintiff, would give up and discharge a certain bond and mortgage; held, that the payment was a condition precedent to the performance on the part of the plaintiff; who might sue for the non-payment, without showing a performance, or offer to perform on his part; nor could the defendant plead the want of such performance or offer to perform.

ON demurrer to the defendant's plea. The plaintiff declared on a covenant, which, on oyer, was as follows: The defendant covenanted to pay certain rent due and in arrear, to one *D. Tomlinson*, on a certain farm, and all which should become due on the 25th of *March*, 1825; the whole to be paid on that day; and the plaintiff covenanted, that on the defendant's so paying the rent, he, the plaintiff, would give up and discharge a certain bond and mortgage. The action was for not paying the rent at the day.

Plea, that the plaintiff did not, on the 25th day of *March*, 1824, give up and discharge the bond and mortgage, nor tender, nor offer to do so, on that day, or before or since.

General demurrer and joinder.

M. T. Reynolds, in support of the demurrer.

A. L. Jordan, contra, cited *Parker v. Paymele*, (20 *John*. 130, and the cases there referred to.)

Curia, per SAVAGE, Ch. J. The plea is bad. The payment of the money to *Tomlinson*, on the day specified, is clearly a condition precedent. The performance by the plaintiff of his part of the agreement is not necessarily simultaneous; but was naturally to be subsequent. A general averment of his readiness to perform, is all that

can be necessary or proper. To aver a tender was certainly not necessary.

Lord *Mansfield*, in *Jones v. Barkley*, (*Doug.* 690,) makes three classes of covenants; 1. Such as are mutual and independent, where separate actions lie for breaches on either side; 2. Covenants which are conditions, and dependent on each other, in which the performance of one depends on the prior performance of the other; 3. Covenants which are mutual conditions to be performed at the same time, as to which the party who would maintain an action must, in general, offer or tender performance. I consider the plaintiff's covenant as clearly belonging to the second class. The defendant's covenant was absolute. The cases cited by the defendant's counsel relate to the third class.

The plaintiff must have judgment, with leave to the defendant to amend on payment of costs.

Judgment for the plaintiff.

CLARK and CLARK against PINNEY.

ASSUMPSIT for money had and received, tried at the *Onondaga* circuit, *September*, 1825, before *THROOP*, C. Judge.

It appeared by the N. P. record, that the suit was commenced as early as *February* term, 1825. The declaration contained the usual money counts. Plea, non assumpsit, with notice of set-off.

On the trial, the plaintiffs' counsel offered in evidence, the record of a judgment in the *Onondaga* C. P. of the term of *February*, 1822, in favor of the defendant against

Where the money was paid on a judgment of a court of common pleas, which was afterwards reversed on error; held, that it might be recovered back in an action of *indebitatus assumpsit* for money had

and received.

The court would not turn the party round to the antiquated remedy by *scire facias*, though they agreed that this would lie; and that where it appears on the face of the record, that the money had been paid, a writ of restitution may issue, even without a *scire facias*.

Taking a promissory note as payment of an execution, and endorsing it satisfied, with the consent of the plaintiff, is equivalent to the payment of money, though the note be not negotiable. And the amount of such a note will be regarded as money, in an action for money had and received, on a reversal of the judgment upon which the execution issued.

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the plaintiffs, for \$193 11 ; a *fi. fa.* endorsed satisfied by the sheriff, June 21, 1822, except sheriff's fees ; that the execution was paid by a note of *Walker & Clark*, by which they promised the defendant to pay him \$181 27, on the 1st day of *February*, 1823, with interest, provided the judgment in the C. P. should not be reversed before that day. That this was received as and towards payment of the judgment by *Pinney* and his attorney. The counsel also offered the record of a judgment for \$216 73, in the *Onondaga* C. P. on this note, recovered at *May* term, 1823, and an execution returnable at the next *August* term, which had been paid before the return day, and was returned by the sheriff satisfied. They also offered an exemplification of a judgment record in the supreme court, in favor of the present plaintiffs against the present defendant, whereby it appeared, that the judgment first above mentioned had been reversed on a writ of error, at the *October* term, 1824. All these facts were admitted by the defendant's counsel, on whose motion the judge nonsuited the plaintiffs, with leave to move to set aside the nonsuit, and for a new trial.

E. Griffin, for the plaintiffs, now moved accordingly ; and the question was, whether an action for money had and received, would lie in this case ; or whether the plaintiffs should be put to their remedy by *scire facias*, or otherwise, on the judgment of reversal.

Griffin cited *Cowen's Treat.* 69 ; *Bull. N. P.* 131 ; *Cowp.* 419.

And that the note was equivalent to the payment of money, he cited 2 *Esp. Rep.* 571 ; 8 *John.* 202 ; 11 *id.* 464.

S. M. Hopkins, contra. That the action for money had and received, is not the proper remedy, he cited 3 *T. R.* 125 ; 7 *id.* 269 ; 2 *H. Bl.* 416 ; 2 *Com. on Contr.* 46, note ; 1 *Ld. Raym.* 742 ; *Com. Dig. Pleader*, (3 *B.* 20) ; *Cro. Jac.* 698 ; *Cowp.* 417, 18, 19.

That giving the note, though it was accepted in payment, was not equivalent to money, it not being negotiable, he cited 3 *East*, 169.

That the money was recovered by judgment on the note given, and cannot be recovered back till that judgment is reversed, or, in some manner, out of the way, he cited 4 *John.* 240 ; 2 *id.* 157 ; 2 *Com. on Contr.* 40, 41, and the cases there cited ; 1 *Esp. Rep.* 84.

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Curia, per SAVAGE, Ch. J. The important question in this case is, whether *indebitatus assumpsit* for money had and received, lies to recover money paid on an execution upon a judgment, which was afterwards reversed.

The general proposition is, that this action lies in all cases where the defendant has in his hands money which, *ex equo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course, he is entitled to have it returned to him. The only question is, whether this be the proper remedy.

The cases referred to by counsel do not fully decide the point ; nor have I found any case where this very point has been decided, except *Green v. Stone*, (1 *Har. & John. Maryland Reports.* 405, *Gen. Court, May Term, 1803.*) It was raised in *Isom v. Johns*, (2 *Munf.* 272.) There the defendant had been plaintiff in a former action ; recovered judgment, and issued execution, upon which the defendant's property was sold by the sheriff. On the argument, most of the English cases which are now cited were referred to. The court decided against the plaintiff, on the ground that the money did not appear to have come to the defendant's use ; not denying the doctrine, however, that, if the defendant had received the money, the plaintiff might recover it in this action.

In *Green v. Stone*, this very point was decided in favor of the plaintiffs.

The principle in question is supposed to have been acted on in *Feltham v. Terry*, (*Lofft*, 207,) which was an action for money had and received by the church-wardens against the overseers of the poor, for money levied by the

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latter, on a conviction of one of the former, which was subsequently quashed. The court held the plaintiff might sue for the money collected by a sale of the property ; or, by bringing trespass, he might have recovered the value of the property. This conviction, I apprehend, must have been irregular ; otherwise the court would not have said trespass might have been brought. Trespass surely would not lie for collecting the amount of a judgment which was merely erroneous. In that case, therefore, the court must have acted on the principle, that the money was collected by a void authority. The authorities are clear and abundant that, in such a case, *indebitatus assumpsit* lies. (1 *Bac. Abr.* 261. *Newdigate v. Davy*, 1 *Ld. Raym.* 742.)

In the case of *Mead v. Death & Pollard*, (1 *L. Raym.* 742,) it was decided, that money paid upon an order of the quarter sessions could not be recovered back, though the order had been quashed on certiorari. And *Tracy*, baron, before whom the cause was tried, compared it to the case where money is paid upon a judgment which is afterwards reversed for error, in which case *indebitatus assumpsit* will not lie. No reason is given why this action will not lie ; nor is any case referred to in support of the dictum. It is shown, however, that, in the English courts, the proper remedy, upon the reversal of a judgment, is a *scire facias*, *quare restitutionem non*, upon which the party recovers all that he has lost by reason of the judgment. (*Com. Dig.* (3 *B.* 20.) *Cro. Car.* 699.) And if it appear on the record that the money is paid, restitution will be awarded without a *scire facias*. (2 *Salk.* 588.)

Cases have been cited in which it is said, that this action does not lie to recover money collected under legal process afterwards vacated, which is true as applied to those cases ; but the principle is not applicable in this case.

Upon the whole, my view of the question is this : the general principle is, undoubtedly, in favor of sustaining the action. *Isom v. Johns*, decided by the court of appeals of *Virginia*, is a plain recognition of the principle as governing this very case ; and *Green v. Stone* is an authority in point. These are opposed only by a *nisi prius* decision, at a time

when the action for money had and received had not come into general use. I am inclined to sustain the action. The inclination of courts is to extend the action for money had and received. It is not denied that the plaintiff is entitled to some remedy for the money, though it was taken from him by process erroneous merely. Then, why turn him round from this simple action to the antiquated remedy by *scire facias*? I do not think the purposes of justice require it.

It is also contended, that the facts in this case do not amount to a payment of money to the defendant. A note was received by the sheriff *as payment* of the execution, by the direction of the plaintiff and his attorney. And the execution was returned satisfied. Nay, more; a judgment has been obtained; and the money actually paid upon that note. To what would the plaintiffs be restored on a *sci. fa.*? To the money paid by the note, *as money*. Restitution could be of nothing else. The difficulty in *Isom v. Johns* was, that the sheriff could not be held the plaintiff's agent. The facts show him to be so in this case.

In my opinion, there should be a new trial.

New trial granted.



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LAMETTI and OTHERS, executrix and executors of
Lametti, against ANDERSON.

COVENANT, tried *January 23d, 1824*, at the *New-York* circuit, before EDWARDS, C. Judge.

A., by indenture, demised a building lot in the city of *New-York*, with a dwelling-house and shop thereon, to W. for 21 years, at a rent of \$165.-- W. covenanted that he, his executors, &c. or assigns, would, at the end of the term, surrender the demised lot, with all such buildings and improvements as might be then remaining thereon, A. paying for such of the buildings and improvements as might be erected and made thereon by W. his executors, &c. or assigns. The parties agreed

that W. his executors, &c. or assigns, at his and their proper costs and charges, during the term, might take down the dwelling house, and erect such other buildings, as he, his executors, &c. or assigns might think proper; and that all such buildings and improvements, as should be so erected, and made, and remaining on the demised lot at the end of the term, should be valued (in a manner specified.) And A. should pay W., his executors, &c. or assigns, the amount of the valuation, not exceeding \$1,500.

Held, that this was neither a building nor repairing lease; that the covenant to pay extended to a new building to be erected at the option of the tenant; but that though the old house was not torn down, and a new one erected; yet the lessor was liable to pay for such additions to, and alterations of the old house, as amounted to improvements: not, however, for ordinary repairs; such as new roofing the old house, or re-building the chimney.

The term being passed by mesne assignments to L., though the improvements were not made by him; but mainly by the lessee, before assignment; in an action by the executors of L. on the covenant to pay for the improvements; *held*, that this covenant ran with the term, which having passed to L. by assignment, before the covenant was broken, carried the covenant to L., who, or whose executors, might maintain an action upon it, in his or their own names.

his executors, &c. or assigns, might think proper ; that all such buildings and improvements as should be so erected and made, and remaining on the demised lot, at the end of the term, should then be valued and appraised by indifferent persons, one of whom should be chosen by each of the parties, or by their respective legal representatives ; and in case the two persons could not agree in the appraisal, then they should choose a third indifferent person ; and such three persons, or any two of them, should make the appraisal in writing, under their hands and seals ; and that, thereupon, the defendant, his heirs or assigns, should pay to *Warner*, his executors, &c. or assigns, the amount of the valuation, provided that such amount should not, on any account, exceed \$1,500.

The term yet to come of this lease was assigned by *Warner*, under his hand and seal, to *Pell*, on the 23d of February, 1807 ; and on the 13th day of January, 1814, in the same form re-assigned by *Pell* to *Warner* ; and so by *Warner*, on the 14th of the same January, to *Lametti*, the testator.

The above particulars appeared upon the declaration, (which went upon the covenant to pay,) and oyer ; and were admitted upon the trial.

The plaintiffs then produced on the trial, an appraisal ; but, on the defendant's objecting to it, on account of certain formal defects, withdrew it ; and the defendant then agreed to try the cause on its merits, reserving all rights he might have upon the state of the pleadings ; and particularly the right to object, that the plaintiffs could not maintain the action in their own names.

The plaintiffs then proved that the dwelling house standing on the demised premises at the date of the lease, had never been taken down. They then offered to prove that material alterations of, and additions to the dwelling house, had been made by *Warner*, to wit, an entire new story underneath, which was rendered necessary, in consequence of the street in front having been lowered 8 feet ; an addition to the rear of the house, and rebuilding the chimney, and altering the staircases ; and the plaintiffs

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claimed the value of the whole. The defendant objected, that the plaintiffs were not entitled to recover, unless the dwelling house had been taken down, and improvements made by putting a new building or buildings on the lot. The judge decided that the plaintiffs might prove any alterations or additions to the house, or adjoining building on the lot, made during the term, and remaining at its expiration. The defendant excepted to this opinion.

The plaintiffs then gave the proof offered, and that a new roof was put on the house; and that various additions to, and alterations of a shop, standing on the demised premises at the commencement of the term, were made. That it was then a mere harness maker's shop, weather boarded, and there was a large gangway between that and the house. That during the term, this shop had been converted into a dwelling house, and extended over the gangway so as to join the other house; a chimney was built in it, and two convenient stories made in that part which formed the first story. That a wall worth 70 dollars had been made by the lessee to keep the ground of the adjoining lot from falling on the demised lot; and that the whole of the additions and alterations made during the term, were worth, (including the wall,) about \$2,300.

The judge charged the jury, that all alterations and additions made to the house or shop, during the term, and remaining at its expiration, should be allowed, if they amounted to improvements of the house or shop; to be valued at their worth when the term expired.

The defendant excepted to this charge.

The jury found for the plaintiffs.

The case came here on the bill of exceptions.

J. I. Drake, for the defendant, moved for a new trial. He said the plaintiffs were not entitled to recover any thing. In true construction, the covenant does not cover either repairs or improvements. The \$1,500 were intended to pay for a new house, to be erected in place of the old one; and nothing more. This is a building lease, not a lease for repairs. Improvements in the lease, do

not mean repairs, or alterations, but new erections only. The intent of the parties is to be regarded. An indenture is the language of both parties. There is not one word concerning repairs in the lease. The first clause is a building clause; and the word *improvements*, afterwards added, is a mere expletive. The words *manner hereinafter mentioned*, refer to the mode of payment or appraisal merely. The object was to secure a good building at the end of the term. (*Lant v. Norris*, 1 *Burr.* 287.) Additions and repairs to a house, are not equivalent to rebuilding. (3 *Atk.* 512.)

But the plaintiffs cannot recover in their own names, if entitled to recover at all; the subject of the covenant, as I have shown, not being *in esse* at the date of the lease; and so is *Spencer's* case, (5 *Rep.* 16, 17. 1st *res.*) The second resolution in that case is, that though the covenant be to make a new erection, yet if the word *assigns* be used, it shall then bind the assignee. But here the word *assigns* is not used throughout. It does not occur in the covenant touching the mode in which the appraisal is to be made. The words here are the parties, or their legal representatives, which do not include assigns. A covenant in a lease, relative to things merely personal, demised with the land, does not run with the term. (*id.* 17, 3d *res.*) The reason is, that the rent arises out of the land, and it is not certain that the chattels will go to the assignee. Here the thing never has come to the assignee; for it never has been built. Privity, both of estate and contract, must be shown by the plaintiffs. (*Shep. Touch.* 176. 1. *Sound.* 241, and notes. 2 *Scho. N. P.* 426, and the cases there cited) Here there is no privity, not even to support a right of distress; the term having expired, and the premises being surrendered. (5 *Cowen*, 407. 10 *John.* 424.)

P. W. Radcliff, contra. The only question, aside from that of parties, is, whether the covenant extends beyond taking down the buildings and erecting new ones. If there be a doubt on this head, that doubt should be turned

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against the covenantor. This rule applies alike to indentures and deeds poll. (1 *Esp. Dig.* 271.) The only question is, for whose benefit was the covenant intended? And if one will make an ambiguous covenant to another, the construction shall be most favorable for the latter. But we do not need the aid of this rule. The judge who tried this cause, gave to the covenant its strict legal and grammatical construction. *Buildings erected and improvements made*, is the sensible distribution of the words. If the phrase, *in the manner hereinafter mentioned*, does not refer to the mode of appraisal, it must refer to buildings and improvements made at the expense of the lessee. If it be doubtful, we have seen that it should receive the latter construction. The dwelling house could not be taken down without the consent of the lessor. Such an act would have been waste; and the testator would not only have been liable to an action; (13 *John.* 31;) but he would have forfeited his term. Hence the license to take down was inserted. But it is a mere license, of which the lessee might or might not avail himself, at his election.

As to the plaintiffs' right of suing in their own names, the counsel for the defendant treats this covenant as a chose in action, in itself not assignable. But it was not so. It was no more a chose in action, than rent yet to fall due upon a lease. It was an unbroken covenant, which ran with the term, and passed to the assignee. The one who held the lease at the expiration of the term, had the right, and the sole right, to sue upon it. If these plaintiffs cannot maintain an action upon it, no one can. Will it be pretended that each of the three different persons who held this lease, shall each have an action in respect to the different stages of building or improvements during their several tenancies? Till the end of the lease, it was not known that the lessor would be liable to pay any thing to any body. All rights passed to the assignees. The improvements belonged to the last assignee, who was entitled to the value. Then for the first time, a cause of ac-

tion arose. Then this covenant did become a chose in action.

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*P. C. Van Wyck*, in reply. Neither the word *repairs* nor *alterations*, is contained in the lease, and they are very properly omitted in the pleadings. Repairs are certainly out of the case; and a sum in gross was given for a particular object, which was building. All the lessor gets, is an old house repaired and kept in order, against 21 years deterioration on it. This is no more than the tenant was bound to return to him, without one word being said in the lease on the subject. The very relation of landlord and tenant, implies that the latter should repair. But all the repairs in the world cannot satisfy the covenant in a building lease. (*City of London v. Nash*, 3 Atk. 512.) It was not intended that the old house should be retained, and surrendered up, nor its necessary repairs paid for. There is but one place for building on the city lots of the class to which this belongs. If there be a house already, it must, therefore, be torn down before another can be erected. The word *repairs* is well understood; and if that be omitted, no word can supply its place. The word *improvement* means something new. Both the pleadings and proof should have shown that the old house was demolished.

*Curia*, per SAVAGE, Ch. Justice. There are but two points in this case of much importance: 1. Can the plaintiffs sustain the action in their own names?

2. Is the defendant liable for any additions, &c. unless the old house was taken down, and a new one erected?

The objection under the first point is, that the covenant does not run with the land; and the assignee cannot, therefore, prosecute for a breach: and *Spencer's case*, (5 Co. 17,) is supposed to sustain the proposition. That case is not in point. The action was brought against an assignee of the term, upon a covenant by the lessee to build a wall on the demised premises; and the court held him not liable, because not named. In such cases, they

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held the rule to be, that the covenant was binding upon the assignee; when it related to something *in esse*, parcel of the demised premises, to repair, for instance; but not when it concerned something to be built thereafter. Yet it was held, that even the latter covenant would be obligatory upon the assignee, if named. The sixth resolution in that case is, "if lessee for years covenants to repair the houses during the term, it shall bind all others, as a thing which is appurtenant, and goeth with the land, in whose hands soever the term shall come." It is further resolved, seventhly, that the assignee, or his executor, should have covenant. (*id.* 18.)

According to this case, had the lessee, *Warner*, covenanted to erect buildings upon the demised lot; not only the lessee, but the assignee, and the executors of the assignee, would have been liable in this action for a breach of the covenant. The same doctrine is found in the other authorities cited by the counsel on this point; and in *Com. Dig. Covenant*, (B. 3.) If the assignee would be liable on such a covenant, surely he must have a right of action, for the violation of a corresponding covenant on the part of the lessor.

The plaintiffs have an undoubted right to maintain the action in their own names, if they have succeeded in showing a right to recover at all.

I do not consider this either a *building* or a *repairing* lease. Those terms are peculiarly applicable to cases where the tenant pays no rent; but enjoys the premises a sufficient length of time to compensate him either for building or repairing, according to his contract. *The city of London v. Nash*, (3 Atk. 512,) was a case where the lessee undertook to rebuild certain houses. He had a lease of them for sixty years. He, or rather his assignee, did not re-build all, but repaired some of the houses. This was held to be a breach of the covenant.

Here the lessor grants a house and lot for a certain term, at a certain rent. The lessee was not bound to repair any farther than so as, at the end of his term, to return the premises in good tenantable condition; unless the coven-

ant in the lease was compulsory upon him to build. The first covenant is, that the lessee shall surrender, at the end of the term, the "lot of ground, with all such buildings and improvements as may be then remaining thereon, he the said *Charles Anderson*, his heirs or assigns, paying for such of the said buildings and improvements as may be erected and made thereon, by the said *Jacob Warner*, his executors, administrators or assigns, in manner hereinafter mentioned." Here it is observable, that the lot was to be surrendered, with *all the buildings and improvements then remaining*. But *Anderson* was to pay for such only *as may be erected and made by Warner*. Now, if it was intended to pull down the old house at all events, this discrimination between the buildings to be surrendered, and those to be paid for, was idle and unmeaning. The next covenant, however, proceeds: "and it is mutually covenanted and agreed, by and between the parties, &c. that it shall and may be lawful for the said *Jacob Warner*, his heirs, &c. at any time during the said term hereby granted, at his and their own proper costs and charges, to take down the said dwelling house, now standing on the said hereby demised lot of ground, and to erect thereon such buildings as he, the said *Jacob Warner*, &c. may think proper; and all such buildings and improvements as shall be so erected and made, and remaining on the said lot hereby demised, at the end of the said term, shall then be valued," &c.; the money to be paid, not to exceed \$1,500. The true construction of this covenant, seems to me to be this: that the lessee might make any alterations which he pleased; and it should be optional with him to take down the old house, and build a new one, or make any other erections which he should think proper; provided the lessor should only pay for such as the lessee left at the end of the term, and which should be improvements; to the amount of \$1,500.

I apprehend, however, that a fair construction of the lease does not authorize a recovery for ordinary repairs. It was improper, therefore, to receive evidence of these; such as new covering the old house, or rebuilding the

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chimney. The lease does not speak of repairs, but buildings and improvements. That must mean new buildings, or such alterations in the old one as to make it more convenient.

The charge of the judge was correct ; but as improper testimony was received, a new trial should be granted ; the costs to abide the event.

New trial granted.

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DICKEY *against* GRANT and OTHERS.

An order was directed by a merchant at *Boston* to merchants at *Leghorn*, for 5 cases of *Leghorn* hats, without any directions as to the manner of packing or securing them. The *Leghorn* merchants, in executing this order, shipped the hats for *Boston* in a vessel which they knew was to touch at *Palermo* for a cargo of oranges and lemons ; and yet neglected to secure the hats in the usual and customary manner ; by reason whereof, they being placed in the hold on the boxes of fruit, were much injured, and sold at auction for less than the invoice price ; held, that the *Leghorn* merchants, having undertaken to execute the order, were bound to do so in the customary manner ; and not having done so, by reason whereof the purchaser sustained an injury, they were liable to him in an action for the damage.

THIS was an action to recover damages, for the injury to, or loss sustained on 5 cases of *Leghorn* hats, shipped by order, and for account of the plaintiff by the defendants, resident merchants at *Leghorn*, on board of the schooner *Penguin*, bound from *Leghorn* to *Palermo*, in the island of *Sicily* ; and thence to *Boston*.

The cause was tried at the *New-York* circuit, *July 17th*, 1824, before BETTS, C. Judge ; when a verdict was found for the plaintiff for \$3277,24 damages.

*G. Brinckerhoff*, now moved for a new trial.

*T. J. Oakley*, contra.

The facts are sufficiently stated in the opinion of the court, which was delivered by

WOODWORTH, J. The question arising in this case is, whether the defendants are liable on the ground of negligence, for a loss sustained on 5 cases of *Leghorn* hats ? The defendants are merchants residing at *Leghorn*. On the 8th of *December*, 1817, the plaintiff sent an order for the hats, requesting to have them sent with the least possible delay, to be here early in the spring ; and if all were not ready when an opportunity offered, to divide the ship-

ment. Five cases were shipped in *March*, 1818, on board a vessel for *Boston*, to touch at *Palermo*, to take in a cargo of oranges and lemons, which was known to the defendants. The fruit was taken in at *Palermo*; and the cases containing the hats placed in the hold on the boxes of fruit, without any precaution taken to prevent injury from the heat and steam proceeding from them. This the plaintiff contends might have been prevented, had the cases been secured when put on board, according to the usual practice and custom in such cases. The goods were afterwards sold at auction, for considerable less than the invoice price.

From the instructions given, it is plain that the plaintiff trusted to the care and diligence of the defendants only; for although the order speaks of *Benini*, it has no reference to the manner of securing the goods when shipped; nor is it a direction to the defendants to employ him. But on the supposition that the defendants would employ him, the plaintiff wished him to understand, that future orders going to him would depend on his executing this with care.

The judge stated to the jury, that the defendants, having undertaken to execute the order, were bound to do it in the usual manner; and if there was an established custom relative to the manner of packing, or preparing such articles for shipment, the defendants were bound to conform to it. He farther stated, that it did appear there was an established usage or custom in packing, or securing *Leghorn* hats; which was, to put them in boxes, to cover the box with a tarred or waxed linen cloth, over that to put hay or straw, and then a coarse covering or wrapper over the whole. That if the defendants had varied from that manner of packing, without the plaintiff's original directions, or subsequent ratification, they would be liable for the damage. And he submitted to the jury, to determine whether the hats were secured according to the usage. The judge also expressed an opinion that the plaintiff had done no act, which, in judgment of law, would amount to a ratification.

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I am inclined to think the charge was substantially correct.

In the instructions to ship the hats, no directions are given as to the manner of securing them. An earnest desire is expressed to forward them as early as practicable. But the duty of exercising proper care and diligence, necessarily devolved on the defendants. The plaintiff had no other agents. There is evidently no subsequent ratification of the defendants' acts by the plaintiff. It is true, that in one of the plaintiff's letters, he speaks of the liability of the underwriters. He entertained an erroneous opinion on this subject. But because he did so, it affords no ground to exonerate the defendants, if they are otherwise liable. There was no ratification subsequently; and consequently the question of negligence is alone presented.

Without analysing the testimony, I think it well established, that there was a general usage to pack and secure articles of this description, in a particular manner, which was not pursued in this instance. The practice appears to have been as stated by the judge to the jury. The defendants, in their letters to *Langdon*, seem to admit this to have been the manner of packing; but which had been departed from in several instances on the ground of economy, and at the suggestion of supercargoes. The articles shipped were of a delicate texture, and easily injured. The defendants had no authority to relax, or depart from the course which prudent caution had pointed out, and experience sanctioned as necessary. The reasons were peculiarly strong in this case. The defendants knew that a cargo of fruit was to be taken in at *Palermo*; and ought to have anticipated the increased risk on that account. The steam and vapor arising from decayed fruit, stained the hats. They became mouldy and deteriorated in value. If the cases had been secured in the usual manner, the witnesses are of opinion the loss would not have happened.

On the whole, I consider this a case of culpable negligence. The verdict is not against the weight of evidence; and the motion for a new trial must be denied.

New trial denied.



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Bohun

v.

Taylor.

**BOHUN against TAYLOR and COLLINS.**

ON error from the *New-York* C. P. The action in the court below was trespass against the defendants, for entering the plaintiff's house in the evening, without leave. *Collins* suffered judgment by default; and *Taylor* pleaded the general issue. On the trial of both upon a venire *tam quam*, the trespass being proved upon both, *Taylor* offered *Collins* as a witness for him. It was objected that he was incompetent; but he was admitted and sworn. He was asked as to the motives and inducements the defendants had to enter the house; and how they came to be admitted. This was objected to, as no special plea in bar, or notice embracing the matter, had been interposed. But the objection was overruled; and the counsel excepted to the decision of the court on both points. *C.* then swore that *Taylor* told him some furniture of one *F.* was missing, and *C.* being a city marshal, they went in search of it; found the outer door open, and went into the house, and looked at the furniture, to see if it was *F's*. &c.

The jury found for the plaintiff, 6 cents damages.

*D. Graham*, for the plaintiff in error, cited 1 *Ph. Ev.* 53, 57, 61; 10 *John. Rep.* 21; 14 *id.* 119; 1 *Str.* 633; 11 *John. Rep.* 57; 1 *Lawy. Mag.* 197; 1 *Archb. Pr.* 195; 1 *R. L.* 344, s. 5; 2 *Tidd*, 902, 7th *Lond. ed.*; *Cro. Eliz.* 860; 11 *Co. 6. a. 7. a*; 6 *Bin.* 316, 319; 1 *Day*, 33; *Bull. N. P.* 285; 2 *Cowp.* 333, n.; 10 *John. Rep.* 95; 13 *John.* 350; 2 *Wash. Rep.* 276; 1 *Munf.* 291; 16 *John.* 89.

*J. Anthon*, contra, cited 2 *Esp. Rep.* 552; 7 *East*, 108; 2 *Campb.* 638.

informed was missing.

*Wers v. Haydon & Venton*, (2 *Esp. Rep.* 552,) overruled.

One of two defendants, sued jointly for the same trespass, though he suffer judgment to pass against him by default, cannot be a witness for his co-defendant. Otherwise, if he plead, and there be no evidence against him.

In trespass against several persons jointly, for the same act, the damages must be jointly assessed, though they sever in pleading; or one suffer judgment by default, and the trial proceed upon a venire *tam quam*.

In trespass *quare domum fregit*, held, that the defendants might show, in mitigation of damages, their motives and inducements to enter the house, as that it was to search for furniture which they had been

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Curia, per SAVAGE, Chief Justice. The questions are, 1, as to the competency of *Collins*, the witness; and 2, the competency of his testimony, under the pleadings.

A defendant cannot regularly be a witness for co-defendants; but if no evidence has been produced against him, he is entitled to his discharge, as soon as the plaintiff has closed his case, and may then give evidence for the others. But if there is any evidence against him, however slight, he cannot be discharged before the rest, and the case must go altogether to the jury. (1 *Phil. Ev.* 61, 2.)

A case is stated by baron *Gilbert*, of trespass against two, for two trespasses, and the question was, if one might be a witness for the other. And he says, it seems that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself. But if it were not the same fact, or at the same time and place, the oath of one has no influence on the fact laid to his charge; but merely goes in discharge of the other.

The reasoning of *Gilbert* is applicable to this case. There was but one joint trespass committed by both defendants; one fact, one time and place; and the testimony given by *Collins* was equally applicable to the assessment of damages against himself as against *Taylor*. Even by his own testimony, the trespass is proved.

So a co-defendant in an indictment, who suffers judgment by default, cannot be a witness, either for or against the other defendants. (1 *Ph. Ev.* 62.) And though they plead separately, and are tried separately, the rule is the same. They are parties to the record, and one is an incompetent witness for the other, until acquittal or conviction; the matter then being at an end as to him. (10 *John.* 95.)

It is contended, however, that the suffering of judgment to pass by default, against the witness, *Collins*, rendered him competent; as his liability was fixed by the default; and his testimony was applicable to the case of his co-defendant, *Taylor*. The case of *Warra v. Haydon & Ventom*, (2 *Esp. Rep.* 552,) is cited to support the proposition.

There, in an action of trover for goods wrongfully distrained, one defendant suffered judgment by default ; and he was admitted by lord *Kenyon*, to prove that the other defendant had no agency in the transaction, except making an inventory of the goods. His lordship held, that the witness was not interested, as he was not liable for the costs of the other defendant.

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In a subsequent case, (*Chapman v. Graves and two others*, 2 *Campb.* 333, *note*,) before *Le Blanc, J.* the same thing was offered, except that the witness was called by the plaintiff against the witness' co-trespassers ; and he was rejected, the judge saying, that, in the former case, he had no interest to charge his co-defendants, as he was called to exculpate them ; whereas he was now called to inculpate them. On the other hand, it is contended that the interest of the witness is direct, as the jury may assess joint damages against both defendants ; and where there is but one trespass, and both are found guilty of the whole trespass, there the damages must be entire, though the defendants sever, and one suffer judgment by default. Such is the settled law in *England*. (1 *Saund.* 207, *a. note* (2). *Hill v. Goodchild*, 5 *Burr.* 2790, 1, 2, and the cases there cited. 1 *Archb. Pr.* 195. *Austen v. Williard et. al.*, *Cro. Eliz.* 860.) The same doctrine is established in *Pennsylvania* ; (*Wakeley v. Hart*, 6 *Bin.* 316, 319 ;) and also in *Connecticut*. (*Bostwick v. Lewis*, 1 *Day*, 34.)

In this court, it has been held, that a joint trespasser, not taken, though named as a defendant in the *capias*, was a competent witness, as he had no legal fixed interest. (*Stockham v. Jones*, 10 *John.* 21.) (a).

But in this case, the interest of the witness was direct. He was testifying to reduce the damages against himself ; for, as the act complained of was one entire act, the damages against both, even if not joint, must be the same. It is certainly dangerous to admit witnesses under such circumstances.

(a) Not being taken, he was not a party for any purpose. (*Ross v. Oliver*, 3 *John. Rep.* 365.)

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To the testimony itself, I can see no objection. The object was merely to mitigate damages, not to justify or excuse the trespass.

I am of opinion that the judgment be reversed; and a *venire de novo* awarded from the *New-York C. P.*

Judgment reversed.

JACKSON, *ex dem.* BRUYN and OTHERS, *against* DEWITT.

D. took a deed in fee, of land, from B.; at the same time giving the latter a mortgage to secure the purchase money. D. then intermarried with M.; and then released his equity of redemption to B., and died, M. surviving. *Held*, that M., his widow, was not entitled to dower.

EJECTMENT, tried at the *Ulster* circuit, *October, 1823*, before BETTS, C. Judge; when the following facts were admitted:
Bruyn, being seised in fee of a farm, on the 12th of *September, 1783*, conveyed it in fee to *Depuy*, in consideration of £800; and, on the same day, *Depuy* executed to *Bruyn* a mortgage for the purchase money. *Depuy*, being in possession under his purchase, married *Catherine Bevier*. On the 8th of *April, 1793*, the mortgage money being due, *Depuy* re-conveyed to *Bruyn*, for the moneys due on the mortgage; and continued in possession, as tenant, 2 or 3 years, under *Bruyn*. The lessor of the plaintiff, *Hizon*, derived title by several mesne conveyances from *Bruyn*, for valuable consideration, all subsequent to the re-conveyance. *Depuy* died several years since, and his widow intermarried with *Miller*. In 1817, her dower was admeasured and set off on application to the surrogate, and the admeasurement affirmed on appeal to this court. She recovered possession of her dower, by verdict, judgment and execution, in ejectment brought in this court, against *Hizon*, the lessor. (See the case, 17 *John.* 123.)

The proceedings before a surrogate, to admeasure and set off dower, are no evidence of title in the widow.
A release, or conveyance of the equity of redemption by the mortgagor to the mortgagee, extinguishes the mortgage.
Dewitt, at the commencement of this suit, held as her tenant.

Verdict for the plaintiff, subject to the opinion of the court.

J. Sudam, for the plaintiff, cited 15 *John.* 458; 4 *Mass. Rev.* 566; 1 *Cowen*, 479.

B. F. Butler, contra, cited 5 *Coven*, 168; 2 *id.* 246, 286.

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Curia, per WOODWORTH, J. The admeasurement of dower is not conclusive. When the widow brings ejectment, she must, as in other cases, make out a title. (5 *Coven*, 168.)

In this case, the defendant holds under the widow, who in a former ejectment recovered. (17 *John.* 123.) The question now raised, was not then before the court.

If the mortgage given by *Depuy* had been foreclosed, it is conceded that the widow would not be entitled to dower; and it is contended that the release of the equity of redemption is to be considered the same as a foreclosure. On the other hand, it is urged, that on the execution of the release, there was a merger, by uniting the equitable and legal estates in the same person, which precludes the mortgagee from setting up the mortgage as a subsisting security. (2 *Coven*, 284.) It is undoubtedly sound, that the mortgage cannot be set up. But the question is, did the right of dower attach? The case of *Hitchcock v. Harrington*, (6 *John.* 290,) and *Collins v. Tracy*, (7 *John.* 278,) decide that the widow may recover her dower out of the land mortgaged, against the tenant deriving title by mesne conveyance from the husband of the demandant; that the tenant cannot deny the seisin of the husband; nor set up the mortgage as a subsisting title, when there has been no foreclosure, or entry by the mortgagee. In this cause, the plaintiff's title is not derived from the husband of the widow; but from *Bruyn*, the mortgagee, who accepted a release of the equity of redemption. The plaintiff may, therefore, set up any matter that *Bruyn*, the mortgagee, might have set up, had *Mrs. Miller* brought an ejectment against him, to recover the land set apart for her dower. From the case of *Stow v. Tyt*, (15 *John.* 458,) it is evident that, up to the time that *Depuy* released, his wife could have no claim of dower; for the husband had an instantaneous seisin only. If the release operated as a discharge of the mortgage mere-

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ly, the widow became entitled to dower; the husband being considered as having been seised *ab initio*. (6 *John*. 294.) But there was no actual payment of the mortgage, leaving the husband seised. There was a merger, by which, it is true, the mortgage was satisfied; but the same act annihilated the mortgagor's title. There was not a moment of time between the discharge of the mortgage, and the vesting of the title in the mortgagee. It was all done *uno flatu*. If, then, no right of dower existed, the moment previous to the merger, (and clearly there did not,) and if the release extinguished all the title the mortgagor ever had; it follows that there never was an instant of time in which the widow was entitled to dower. I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

BUCHANAN against THE OCEAN INSURANCE COMPANY.

The owner of the cargo, without request from the owner of the vessel, repaired her on the voyage; and effected an insurance in his own name, on his expenditures for repairs. *Held*,

ASSUMPSIT, for a total loss on a policy of insurance; tried at the *New-York* circuit, in *January*, 1824, before EDWARDS, C. Judge.

At the trial, the policy was produced, bearing date the 15th day of *March*, 1821; and was in the usual form of policies on vessels, commonly used by the insurance companies in the city of *New-York*, partly printed and partly written. The first part was as follows: "Vessel. By that he had not an insurable interest; that the repairs being voluntarily bestowed, belonged to the vessel; and the property of them vested in the owner.

The insurance was by a wagering policy, and against total loss only. The owner of the vessel had previously insured her; and after she had arrived at her port of destination, she was abandoned as for a technical total loss, by the owner, to his underwriters; and sold with their consent, and for their account. The owner of the cargo, who had made the repairs, then abandoned to his underwriters. *Held*, that this was not such a total loss as came within the policy; that a constructive total loss of the subject was not enough. But the loss must be absolutely and finally total.

The provision in a policy of insurance that the risk is against total loss only, means an absolute, not a mere technical total loss, whether the policy be a wagering policy or not.

A declaration on a policy of insurance upon a vessel, need not aver any interest in the assured; and if interest be averred, this may be rejected as surplusage.

The Ocean Insurance Company. *A. C. Buchanan*," (the plaintiff.) "On account of whom it may concern, in case of loss payable to *A. C. B.*, do make insurance, and cause to be insured, lost or not lost, at and from *Newport* to *Londonderry*, upon the body, tackle, apparel, and other furniture of the good ship called the *William and Jane*." It was what is called an open policy; the usual blank for the valuation not being filled with any thing; this clause in the policy standing thus: "The said vessel, tackle, &c. hereby insured, are valued at _____, without any further account to be given by the assured, or any of them for the same." The premium was one *per cent*. The clause relative to the payment of loss and proof of interest, was in blank as to the person in whom the interest was to be proved; and was as follows: "In case of loss, such loss to be paid in 30 days, after proof of loss and proof of interest in the said _____; the amount of the note given for the premium, if unpaid, being first deducted." The policy contained the usual printed clauses as to other insurance, &c., and was underwritten as follows: "\$6500. Six thousand five hundred dollars. The above insurance is hereby declared to be on amount disbursed for repairs of the said vessel at *Newport*, to which place she returned in distress, and is against total loss only." (*Signed by the President, &c.*) On the margin of the policy was written as follows: "It is hereby agreed to take the additional sum of two thousand dollars, on this risk, at the same rate of premium, being also on amount of repairs disbursed at *Newport*. *New-York*, 19th March, 1821." (*Signed by the President and attested by the Secretary.*)

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The policy being admitted, the plaintiff read, as preliminary proof, an abandonment by the plaintiff as for a total loss, previous to the vessel's arrival at *Londonderry*, dated *August 25th*, 1821, an affidavit and statement showing the amount of repairs at *Newport*, &c. &c. which were admitted to have been duly furnished.

The following are the other material facts, as they appeared at the trial: the vessel, *Wm. W. Polke*, owner, sailed originally, on the 24th of *December*, 1820, *John*

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*Brown*, master, from *New-York* for *Londonderry*, laden with a cargo of flax seed, belonging to the plaintiff; naval stores, staves and other articles. On the 25th of *December*, she encountered severe weather, and was finally obliged to put into *Newport* in distress, where she arrived the 2d of *January*, 1821. Here she underwent the usual surveys and repairs, which were completed on the 1st of *March*, 1821. The repairs amounted to \$9005,30, which sum was paid by the plaintiff's agent. On the 7th of *March*, the vessel sailed from *Newport*. She arrived on the *Irish* coast the 27th, and took a pilot, and came to at *Quigley Point, Loughfoyle*; and after part of the cargo was taken out by lighters, in attempting to go up to the quay of *Londonderry*, she ran aground on the south side of *Tuor Patch*, and was not got off and brought to the quay till the 12th of *April*. She was there, on survey, found to be much injured, and incapable of repair, at *Londonderry*, for want of a dry dock. Nor could she be hove out; and it was extremely hazardous to send her to *Glasgow* or *Liverpool*. It was the opinion of the surveyors that she should be sold at *Londonderry*. She was accordingly sold for account, and with the consent of the agent of the *London* insurers, on the 18th or 19th of *June*; and purchased by the captain as agent for the owner, *Polke*, for £550—\$2200, or thereabouts. The plaintiff arrived at *Londonderry*, after the sale. The captain knew nothing of the plaintiff's insurance, at the time of the sale; though he knew the vessel was insured at *Lloyd's*. She could not have been repaired at *Londonderry*, for less than £2100—\$8,200. On the 8th of *July*, she sailed for *Liverpool*, the plaintiff sailing there with her, where she arrived on the 10th of *July*, 1821. There she went into dry dock, and was repaired in 12 or 14 days. About the 18th of *August*, the captain chartered her for *Philadelphia*. The expense of the repairs at *Liverpool* was not precisely ascertained; but the captain thought they could not be less than \$3500; and that after being repaired, she might have been worth from 8 to \$10,000. After the vessel returned to *Philadelphia*, she was sold and sent to the



*East Indies.* The owner had, before the insurance in question was made, insured the vessel at *Lloyd's, London*, for £3000 sterling—\$13,320; and he had been paid as for a total loss by the underwriters there, deducting the £550, for which the vessel sold; and when the defendants made insurance, they knew of the one made at *London*, which was from *New-York* to *Londonderry*. The plaintiff admitted himself, at *Liverpool*, to be the agent of *Polke*. The former had no interest in the ship; nor was he a member of the firm of *Wm. Buchanan & Co.*, the consignees at *Londonderry*, of both vessel and cargo. The plaintiff abandoned, as before mentioned, on the 25th of *August*, 1821.

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Verdict, by consent, for the plaintiff, for \$9,901,37, subject to the opinion of the court on a case; and with liberty to either party to turn the case into a bill of exceptions or special verdict.

The following points were now made for the plaintiff:

1. Such a loss as authorized an abandonment to the underwriters on the vessel, authorized an abandonment on the policy on the disbursements.

2. There was a technical total loss of the vessel.

3. Though there was a prior insurance on the vessel to her full value, yet this insurance is valid.

4. No interest in the vessel was necessary.

5. Though the vessel was restored when the abandonment was made, this did not destroy the right to abandon; for the subject continued to be totally lost.

*C. D. Colden*, for the plaintiff. This is the common form of a policy, when it is intended to insure something collateral to the body of the vessel or property; and the points all hang on the question, whether there was a total loss. This depends on the facts. The loss of the vessel was necessarily a loss of the repairs. The company knew that the plaintiff had no interest in the vessel; and that they were insuring something distinct from the body of it. They insure disbursements for repairs expressly; and it is evident from the case, that they perfectly understood

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what they were insuring. They knew that a loss which should transfer the whole subject matter, would be the ground of an action on the policy. An abandonment of the vessel passed the repairs insured, to the underwriters at *Lloyd's*. The owner was not bound to forbear the abandonment on his part, for the benefit of the plaintiff. The provision in the policy, that it should extend only to a total loss, must be construed to mean, as in other cases, either a physical or technical total loss. The meaning is the same in this as in any other policy. The only difficulty with which we can be met on the nature of the loss is, that the vessel arrived at her port of destination. But it is now well settled, that this will not prevent the loss being total. (*Beawes' Lex. Merc.* 298, 311, 4th ed. cited 1 *T. R.* 189. *Phil. on Ins.* 400. 11 *John.* 295.) We do not deny, that if the subject was restored when the abandonment was made, all right had gone. It was not so. It was totally lost; and never was restored to the plaintiff. It could not be; for it had passed to the other underwriters, and then, by the sale, to the purchaser. Indeed, an abandonment in the plaintiff's case was not necessary. It is never necessary, where you can claim nothing from it. It does not affect the rights of the parties. (8 *John.* 246. 2 *id.* 155. *Phil. on Ins.* 382.) The plaintiff had nothing which he could abandon. It might have been a technical total loss as to the vessel, but it was physically total as to the plaintiff. (3 *John. Cas.* 34.) A party insuring profits, may recover, on proof that the cargo is lost. Here the incidental loss is equally certain. This is precisely like the case of an insurance of profits against a total loss only. (1 *John.* 435, 439.)

No doubt the vessel was insured by the *London* policy; but the defendants knew this; and the insurance in question is good, unless the *London* policy covered the repairs. The one who has insured the vessel is never received as an insurer on the profits also. The clause in the policy relating to other insurances, can only apply to the very subject insured at the time.

The plaintiff clearly had an insurable interest. His interest was to have the voyage go on.

But the words of the policy dispense with the necessity of showing interest. If it were a mere wagering policy, it is not void according to our law. But it is not a wagering policy. The plaintiff had expended every cent he got insured.

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*T. A. Emmett*, (same side) cited 1 *B. & P.* 316; 1 *Burr.* 489; *Marsh, on Ins.* 150; *Park on Ins.* 374; *Ph. on Ins.* 490, 1; 1 *Wheat.* 219; 6 *Mass. Rep.* 119; 1 *John. Cas.* 226; 6 *Mass. Rep.* 318; 4 *Bin.* 386; 15 *Mass. Rep.* 341; 3 *B. & P.* 308; 4 *Dall.* 421; 3 *Rob. Adm. Rep.* 288; 1 *Peters' Adm. Rep.* 223; 4 *Bin.* 539, per *Tilghman, C. J.*; 5 *Serg. & Rawle*, 473; 12 *Mass. Rep.* 214; 11 *John.* 233; 1 *id.* 249.

*G. Griffin, contra.* The clauses relied on as peculiar, by the other side, are now very common. If it be admitted, as it must be, that the *London* policy covered the vessel, then it follows that it cannot be covered by this, which provides in terms against such a case. Not only the value of the vessel when she sails, but all subsequent repairs, are covered by an insurance on the vessel. By the settled rule of the English law, the whole would be covered. (12 *East*, 655, per *Lord Ellenborough, C. J.* 4 *Taunt.* 367.) Suppose a wagering policy to be good; this is not one. (1 *Condy's Marsh.* 121. 1 *T. R.* 304. 3 *Caines' Rep.* 141.) The declaration avers interest in the plaintiff. This he must establish, or fail for the variance. This is not a mere matter of form. It is the very gist of the case. The payment made for repairs was made by the plaintiff, as agent for *Polke*, the owner, who, for aught that appears, has re-imbursed him. An insurable interest always involves the right to abandon. Here was no such right. The nature of the interest should have been specified in the policy. Clearly the plaintiff had nothing which was insurable, without being so specified. (2 *John. Cas.* 250. 2 *John. Rep.* 346. 7 *id.* 522. 4 *B. &*

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A. 582.) The policy mentions repairs. But it does not mention who the owner was; and could we dream that the plaintiff would insure repairs on another's vessel? It is wrong to consider this an insurance on profits. If it be so, where is the total loss against which we are to insure?

The words *total loss*, mean an actual or physical total loss. This is clearly so, if, as contended for the plaintiff, the policy is a wagering one. (3 *Caines' Rep.* 141.) The words, providing against any thing short of a total loss, mean the same thing as these words, "warranted free from average, unless general." That clause, like the one in question, has been construed to exclude a technical total loss. (*Phil. on Ins.* 489. 6 *Mass. Rep.* 471, &c. *per Sewall, J.* 1 *Condy's Marshall*, 227. 16 *East*, 214. 7 *Taunt.* 154. 2 *M. & S.* 371. 1 *Wheat.* 219, 224. 1 *John. Cas.* 226. 1 *Caines' Rep.* 196, 212. 3 *Caines' Rep.* 108. 14 *John.* 138.)

Here was neither a technical nor physical total loss. There was no loss of voyage, either as to vessel or cargo. The vessel remained, as a vessel. Suppose the plaintiff had an election to abandon, he was not bound to do it. And not doing so, it would certainly have been a partial loss only. There is no evidence, whatever, that the repairs at *Liverpool* amounted to 50 per cent. This being so, there was no right to abandon. It lay with the assured to show the extent of the loss. (3 *Caines' Rep.* 149.) Taking all the evidence, there is nothing like a loss to 50 per cent., after deducting one third new for old.

But the subject was completely restored before abandonment. This is conclusive. (4 *Coven*, 222. 5 *id.* 63.) The repairs never could come to the hands of the insured. When the vessel was restored, the repairs were restored. They are a part of the vessel.

We are aware of the rule of law, that different individuals may be insured, as to different interests in the same subject. Thus, a lien may be insured; bottomry may be insured, &c. &c. But the plaintiff had no lien; or if he once had a lien, he parted with it, when he parted with the possession of the vessel. But he proved no lien at any time.

*D. B. Ogden*, (same side.) There cannot, in the nature of things, be any loss without interest; without something to lose. And in such a case the assured cannot recover except on a wager policy. (*Park on Ins.* 359.) Wager policies were bad at the common law. (*id.* 346. 1 *Burr.* 492.) It will be seen by examining the authorities, that, as the common law stood before our revolution, there can be no doubt on the subject; and one question is, whether we are bound to follow the English courts in their adoption of a different rule afterwards. Before 1775, these wagering policies were unknown to the law of this state. Two cases have been before this court. (*Juhel v. Church*, 2 *John. Cas.* 333, and *Clendinning v. Church*, 3 *Caines' Rep.* 141,) relative to these policies; and by neither was their validity sanctioned. Neither case passed upon the question of their validity; though, it is true, that in the last, a wagering policy was admitted to be good by counsel. *Bunn v. Riker*, (4 *John.* 426,) *Mount v. Waite*, (7 *John.* 434,) and *Campbell v. Richardson*, (10 *John.* 406,) decided that wagers at common law are valid. But all these cases agree in the qualification, that if they are against public policy they are utterly void. Wager policies are clearly against public policy. At any rate, there can be no doubt of this as to the policy in question. To be consistent with sound policy, the contract of insurance should never be more than a contract of indemnity. If it be more, it is a departure from the first principles of insurance law. This was so held expressly, and on the single point being presented, in *Amory v. Gilman*, (2 *Mass. Rep.* 1.) In that case, it was decided, in so many words, that "a wager policy is not a valid contract." The practice of making wagering policies was finally found to be so great an evil in England, that it was abolished by the 19 *Geo.* 2, which brands it in the preamble as pernicious.

But why should we contend the point here? The variance is fatal. An interest is averred, but not proved. The insurance is not on repairs; but on the money expended for repairs. Suppose there had been a bottomry bond for the money: the insurance would not operate upon that,

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because it is not named. So of the repairs. These not being named, the insurance cannot reach them.

Suppose the plaintiff had a lien; he was bound to enforce it at *Londonderry* in a court of admiralty, where he would have got his money. His omission to do so, authorizes us to infer that his money has been paid to him. At any rate, the omission was his own fault. There could have been no loss without that fault; and for this we are not amenable. The obligation of the underwriters is entirely complied with.

But the object of repairing had been answered. The vessel reached her port of destination; and the risk then ended. The vessel was not irreparable; but was repaired, without expending one half her value. (4 *Bin.* 386.)

Here was no right of abandonment. (10 *John.* 177.) There can be no such thing as a sale where there is but one man to be both vendor and vendee.

*T. A. Emmet*, in reply. If the insurance upon repairs is kept distinct from that upon the vessel, and *Buchanan* from *Polke*, much of the apparent difficulty of the case will be removed. If the plaintiff had an insurable interest, it is no matter whether it was covered by the English policy or not, so long as *Polke* is considered the owner, as he must be upon the case. The English insurance was not for the benefit of the plaintiff. With him, therefore, there is no double insurance.

But we deny that double insurance is contrary to commercial law. It is only contrary to the special contract of the parties. The effect upon the assured is, that he can receive but one indemnity, whatever be the number of insurances he may have effected. Out of these he may elect which; and this may come upon the others for contribution. This was never said to be against commercial policy. It cannot be that the *London* underwriters must pay for a partial loss on repairs; and then a total loss on the ship.

The subject is truly specified in the policy. It is the repairs in which the plaintiff had an interest. This was

enough. It was not necessary he should have an interest in the ship. He stood in a relation to the repairs from which he had a right to expect the worth of them. He had no personal remedy for his expenditures against *Polke*; nor does it appear that the repairs came within the English policy. They were put on the ship without the consent of *Polke*, who was probably unable to advance the amount. He might, therefore, refuse to pay. The whole was voluntary with the plaintiff.

The plaintiff is in conscience entitled to redress; and the court will, in order to promote justice, sustain a wagering policy. They will do this, at least, where they see no other remedy can be had.

But the interest is an insurable one. Payment for the repairs is, at all events, to be made to *Buchanan*; in justice, if the repairs were voluntary; in law too, if they were made at the request of *Polke*. No matter who owned the ship. The value of the repairs was due to *Buchanan*. Suppose this to be a wagering policy because there was no technical legal interest, there is enough to sustain it as a wagering policy. *Kulen Kemp v. Vigne*, (1 T. R. 304,) was much such a case as this. There the action would have been sustained, had there been a total loss. The validity of wagering policies has been repeatedly acknowledged by this court. When we allow an insurance on profits, we admit what comes very near a wagering policy, as in *Juhel v. Church*, (2 John. Cas. 333.) But several of the cases which I cited on the opening, show that the plaintiff had a lien for the price of the repairs; and such an one as might have been enforced by a court of admiralty. Less than this will give an insurable interest. (*Phil. on Ins.* 27. 5 B. & P. 269. 1 Marsh. on Ins. 105. 1 B. & P. 316.) It makes no difference, according to these authorities, whether the plaintiff could have paid himself by virtue of the English insurance, or not. The original interest cannot be affected by this consideration. But he could not recover upon the English policy. The whole went with the abandonment to the English underwriters, including the repairs. (*Phil. on*

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*Ins.* 477.) He could not go against them unless he was the owner. Each person interested may insure his own interest. (*Phil. on Ins.* 11. *Marsh. on Ins.* 105. *Park on Ins.* 374.)

No doubt the provision in the policy excludes an average loss. But I deny its application to this case. It does not apply when the subject itself is lost. Physical loss is not necessary to be shown. It may be by capture. (*Phil. on Ins.* 488, 490, 491. 6 *Mass. Rep.* 318.) Such a loss would be within this policy. Any thing creating a total loss, without a mere depreciation of the property, is within the policy. The technical total loss of the ship, resulted in the actual total loss of the incidental subject matter, the repairs, and the remedy for their value. The lien was gone by the sale. The purchaser came in under a different and paramount right, a new title. The *London* underwriters directed the sale. The title was in them; and the repurchase did not re-vest the lien. The owner had a right to abandon: (11 *John.* 295; *Phil. on Ins.* 400; 4 *Bin.* 356; 15 *Mass. Rep.* 341; 3 *John. Cas.* 34;) and the underwriters at *Lloyd's*, to accept the abandonment. The plaintiff had no control over the right. He had no hold on the ship at the time of the abandonment, by which he could secure his lien. At least, there is no evidence that he had.

The amount of repairs at *Liverpool* had nothing to do with the right of the owner to abandon. The ship had been damaged more than 50 *per cent.* on her voyage. And it is her state at the place of destination, where she was abandoned and sold, which is to determine the right. We go upon the abandonment, and acceptance in good faith, as taking away all our right.

It was not necessary for us to abandon. There could be no salvage. (4 *Dall.* 421. 5 *B. & P.* 310. 1 *John.* 433.) It was an idle ceremony. Nothing could pass by it. We did, however, abandon.

*Curia, per SAVAGE, C. J.* The question first in order, is, had the plaintiff any insurable interest in the ves-



sel? The insurance is upon the body, tackle, apparel and other furniture of the good ship called the *William and Jane*. Afterwards is the following clause: "The above insurance is hereby declared to be on amount disbursed for repairs of the said vessel at *Newport*; to which place she returned in distress, and is against total loss only."

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The plaintiff expended in repairs at *Newport*, \$8,500;(a) at whose request, or by what authority, the case does not state. The owner of the cargo, not being the owner of the vessel, is not bound to repair. It is the duty of the owner of the ship, or his agent, the master, to see the vessel repaired, when necessary. The plaintiff told the captain at *Liverpool*, that he acted as agent of *Polke*, the owner. Whether he acted as agent of the owner at *Newport*, does not appear. If he did, then the repairs at that place were properly recoverable of the *London* insurers. (12 *East*, 655.) Lord *Ellenborough* there says, "there may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs, in fact made, in consequence of injuries, by perils of the seas, prior to the happening of the total loss, are of this description. The vessel was insured in *London*, by *Polke*, the owner. If he paid for the repairs at *Newport*, he had a claim for those repairs upon the *London* underwriters. They were covered by the *London* policy, whether the policy by the defendants be a double insurance or not. If the plaintiff was not the agent of the owner at *Newport*, what interest did he acquire by making the repairs voluntarily? He took no bottomry nor other security upon the vessel, which the master was authorized to give; nor did he receive any security from the owner. Did he then acquire any lien upon the vessel? It is conceded the plaintiff had no interest in the vessel. What interest had he? The cases cited show that a lender on bottomry may insure his interest; but it must be by name, and not an insurance on the ship. A

(a) The amount stated ante, 320, includes some items of disbursement at *Newport* beside repairs.

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consignee of the cargo, and an assignee, may insure. Any one, in short, who has a lien on the ship or cargo, may insure the property on which his lien attaches. How could the plaintiff have proceeded to enforce his lien, if he had one upon the ship? He had indeed paid money in repairing the ship, which he was not bound to pay; and I am now supposing the money paid voluntarily. I know of no proceeding which he could have had, *in rem*, to have sold the vessel to reimburse himself. The money was paid for the benefit of the owner; but he might have preferred to have the captain raise the funds with those means which were authorized by law. The captain might have borrowed money. He might, under certain circumstances, have sold or hypothecated the cargo. In the case of *Dickey v. The N. Y. Ins. Co.*, (4 Cowen, 222, 5 Cowen, 66, S. P.,) the captain did sell part of the cargo, and hypothecate part of it; and though it was strongly urged, that the ship was bound to the cargo, as the moneys thus raised were expended in repairs; yet this court said, there was no lien on the vessel, as it was not pledged for the payment. The present case is certainly not stronger. The captain, I will suppose, might have sold or hypothecated the plaintiff's flax seed, for the \$8,500, expended in the repairs. According to *Dickey's* case, the lender on respondentia would have had no lien on the vessel. Here the owner of the cargo, being present, prefers to raise the money rather than have his property sold or hypothecated for that purpose. Can he be in a better situation than one who should advance his money? Whatever remedy the plaintiff in this case may have, I am not authorized to say that he had a lien on the vessel. No analogous case has been cited. I am well warranted, therefore, in saying none can be found. Nor do the writers on insurance enumerate any such demand as an insurable interest. (*Phil. on Ins.* 57. 1 *Marsh. on Ins.* 104. *Park on Ins.* 374.)

I am bound, therefore, to conclude, that the plaintiff had no insurable interest in the vessel. The repairs had become part of the vessel; and having no lien for the money expended, he had no insurable interest in that.

But suppose it were otherwise, and his interest were admitted : it is contended the defendants are not liable ; the insurance being against *total loss only*.

In the case of *Murray v. Hatch*, (6 *Mass. Rep.* 465,) the policy was in the usual form, except that at the bottom was a memorandum in these words : *This risk is against a total loss only*. The vessel was cast ashore ; and though she might have been got off, and repaired for less than half her value, the master having no funds, sold her. It was held that the insurer was not liable. *Sewall*, Justice, who delivered the opinion of the court, considered this memorandum a restriction to some purpose. It was considered as having the same effect as exceptions and warranties against particular averages and partial losses, in what is called *the common memorandum*. The general principle in cases on such exceptions and warranties is, that the insurer is liable as for a total loss, when the subject matter is destroyed, or when the voyage is defeated and lost. In *Nelson v. The Col. Ins. Co.*, (3 *Caines' Rep.* 108, 110,) the insurance was on corn, with the usual memorandum. The court say, so long as the corn physically existed, there could not be a total loss. (*See also* 14 *John.* 136.)

Whether there was, in this case, a technical total loss ; whether an abandonment was necessary ; or if so, whether it was made in due season, are questions not necessary to be discussed, upon the view which I have taken.

The only remaining question is, whether the plaintiff is entitled to recover as upon a wager policy ? In these policies, the person insured is not required to have any interest in the thing insured. Wagering policies are mere games of hazard, like the casting of a die. (*Doug.* 470.) It is to be regretted, that wagers ever were allowed to be the subject of an action. Wagering policies were, however, lawful in *England*, before they were prohibited by statute. They are unlawful in *Massachusetts*. But they have been recognized by this court.

In the case of *Juhel v. Church*, (2 *John. Cas.* 333,) in the body of the policy, \$12,000 were insured on goods for

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the voyage ; but by a memorandum in writing, it was declared to be on profits. No proof of interest was to be required, and the goods were warranted free from average and without benefit of salvage. The ship returned to *New-York* in ballast, finding no goods on the Spanish main, whither, and back, she was insured. *Kent*, Justice, says, "I consider this as a wager policy. It was betting on the return of the ship." In that case, it was made a point, whether a wager policy was void. *Kent*, Justice, says, "But supposing the policy to be good, (and I wish not to be understood as intimating any opinion to the contrary,) I am equally of opinion that the plaintiffs are not entitled to recover." In *Clendining v. Church*, (3 *Caines' Rep.* 141,) the court considered the policy in the light of a wager policy.

The averment of interest is not necessary, in a wager policy, nor in a policy upon interest ; (2 *East*, 392 ;) and may therefore be considered surplusage.

It is then settled, that a wager policy is a bet upon the arrival of the ship. The perils which happened during the voyage are immaterial. Her arrival determines the bet. *Kent*, Ch. Justice, in giving the opinion of the court, in *Clendining v. Church*, says, "In wager policies, the loss should be absolutely and finally total ; for otherwise, a temporary embargo of only one day, without any other interruption of the voyage, would be a total loss, although the vessel should have arrived in safety."

In whatever light, therefore, this case is considered, it seems to me, the plaintiff cannot recover.

I am of opinion that judgment be given for the defendants.

Judgment for the defendants.

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TOLE and WIFE *against* HARDY.

ASSUMPSIT for 100 dollars, a legacy bequeathed to Mrs. *Tole*, one of the plaintiffs, by the will of her late father, *William Hardy*, deceased; tried at the *Montgomery* circuit, *June 9th*, 1825, before *WALWORTH*, C. Judge.

The declaration was of *Saturday*, the *5th* of *March*, 1825; and alleged, that on the *4th* of *May*, 1824, the testator, being seised in fee of a farm in *Springfield*, *Otsego* county, devised it to the defendant in fee, subject (*inter alia*) to the legacy claimed; that the testator died on the *12th* of *June*, thereafter; that the defendant entered into

An action of assumpsit lies, against a devisee, for a legacy charged exclusively on the land devised, or on his person in respect to the land if he enter, and promise to pay. But the aid of the personal estate must be excluded ex-

pressly, or by necessary implication, on the face of the will.

Evidence that a third person was in possession of the land, to whom the devisee, before his promise, gave directions as to remaining, and quitting the possession, is sufficient evidence of the entry and possession of the latter, to sustain an allegation to that effect in the declaration, and support a promise to pay the legacy charged; especially where, after the promise, the devisee took actual possession.

The assent of the executor is not necessary to a legacy charged on land.

Where the testator, having real and personal estate, by his will, provided a support for his wife, out of his estate, requiring her to pay his debts; and then bequeathed certain specific legacies; then devised his farm to his son, and directed in terms, that he should pay certain pecuniary legacies to other children, and the will then said, "also, J. H. is to have \$250, also to F. H. \$100," and appointed the devisee of the farm one of the executors; held, that the direction to the devisee to pay, applied to all the legacies, and charged the land; but not so as to exclude the aid of the personal estate; it not appearing on the face of the will that all the personal estate had been bequeathed; and though this might have in fact been so, yet parol evidence could not be received to vary the construction as it stood on the face of the will, there being no latent ambiguity.

A latent ambiguity is that which arises from evidence, *dehors* the instrument. It may then be explained by such evidence.

A court of law has no jurisdiction of an action to enforce payment of a legacy charged on land devised, or on the devisee in respect of the land, though he may have entered and promised to pay, unless the land be exclusively charged. Where this is not so, jurisdiction belongs to a court of equity.

Though a legacy be charged upon land devised, or on a devisee in respect of the land, yet this does not exclude the aid of the personal estate from the payment. This is always the primary fund for the payment of legacies, unless it be excluded by express words in, or necessary implication, to be derived from the will itself on its face. Such a construction cannot be established by matter *dehors* the will.

What is sufficient proof of assent to a legacy by an executor.

In an action on a promise by a devisee, to pay a legacy charged on the land, or on the devisee in respect of the land, the value of the land is immaterial, and cannot be inquired of at the trial.

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possession, and in consideration of the premises, before suit brought, promised the plaintiffs to pay, &c. Plea, the general issue.

At the trial, the will was given in evidence; which was as follows: "and touching such worldly estate wherewith it hath pleased God to bless me, I will and bequeath in the following manner and form: It is my will, that my, &c. wife *M. H.* be maintained out of my estate as long as she lives, and she is to have a cow and four sheep, and a hog kept over and above per year; also, she is to have all the household furniture, and household stuffs whatever; and also, she is to have all the grain that is in the chamber, and in the barn, and on the land at my death; and she is to have the old mare and feathered fowls, and pay all the debts; and she is to have all the cattle, sheep and hogs at her own disposal. Also I give to my son, *William Hardy* (the defendant) all my estate that I now live on, which shall be his forever; and he is to pay as follows: that is, to my son *J. H.* \$250, to my son *C.* \$250, also to my son *D.* \$250, to my son *J.* \$200, also to my son *Jer.* \$250, also *Jas.* is to have \$250 and the Canada mare, and all the farming utensils, such as waggons, sleighs, &c.; the farming mill and cider mill is to remain on the farm. Also, my daughter *Margaret* is to have \$100, also my daughter *Mary* \$100, also to *E.* \$100, also to *F. H.* (the plaintiff's wife) \$100." The will appointed the widow executrix and the defendant executor, and was dated *May 4th*, 1824, and duly attested by three witnesses. By a codicil, attested by two witnesses, the testator declared that his will should not take place till six months after his death.

It appeared that the testator died on the *12th of June*, 1824; and the defendant moved on to the farm devised to him in *February*, 1825. The widow, a witness for the plaintiffs, swore, that the defendant said, about six months after the testator's death, he would pay the legacies in the will, if she would release her dower, maintenance, &c. She did so, and the defendant then said he would go on and take the farm, and pay the heirs.

On objection, the evidence of the release of dower was rejected by the judge. He also excluded evidence as to the value of the farm devised to the defendant.

The witness then testified, that the testator's debts did not exceed \$30 in the whole; and that they were all paid or assumed by her. Direct promises by the defendant, to pay the legacy due to the plaintiffs, was also proved to have been made in *January* and *February*, 1825. But he finally refused to pay, unless a bond with sureties was given. It appeared that he afterwards claimed the farm by virtue of the will. It also appeared that the testator died in possession of the farm.

The plaintiffs having rested, the defendant moved for a nonsuit, on the ground, 1. That the declaration stated the testator died seised in fee. This was overruled, the judge holding that his possession was *prima facie* evidence of the seisin in fee. 2. That no assent to the legacy by the executor and executrix was proved. The judge decided that this was not necessary. 3. That the promise was before the defendant entered, though the declaration alleged, as a part of the consideration, his previous entry. The judge decided that the defendant's election to take was enough; and the land, being devised to him and charged with the legacy, were the only real and legal considerations; and if further evidence of taking possession was necessary, it might be given. 4. That the legacy was not charged upon the land, or upon the person of the defendant, in respect of the land; and was only chargeable upon the personal estate. The judge reserved this question.

The plaintiffs then proved that the will disposed of all the testator's personal estate, except a pew in the church, and one or two small notes, either of which articles were of but little or no value. That the whole of the testator's personal property was of about \$500 in value; and his debts very trifling; that the defendant had paid some of the heirs in part.

The evidence that there was no personal estate beyond what was mentioned in the will, and specifically devised, was objected to; because, to give a construction to the

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26. will, this should appear on the will itself. But the judge received the evidence, subject to the opinion of the court.

y. The plaintiffs also proved, that in *December*, 1824, the defendant gave *James Hardy* liberty to continue on the farm devised, till *May* following; and that the defendant, at the time of giving liberty, claimed the farm under the will; and said he would take possession, and pay the legacies. That the defendant, shortly after, told *James Hardy*, he wanted he should go off the farm sooner than he at first directed.

Farther particulars will be found stated in the opinion of the court.

Verdict for the plaintiff, subject to the opinion of the court, on all the questions arising in the cause.

B. F. Butler, for the plaintiffs. 1. The seisin of the testator was proved, by showing him possessed of the premises at the time of his death. 2. Assumpsit will lie against a devisee of land, or on a devise of a legacy in respect of the land, whether expressly charged, or clearly so by implication. 3. The assent of the executor to a legacy is not necessary, when it is charged on the land. (*Toll. L. E.* 306, 2d ed.) 4. The defendant's accepting of the devise, promising to pay, and agreeing with *James* to continue in possession, before the promise, was a sufficient entry to support the declaration. The devise to the defendant is, in fact, the only true and legal consideration for the promise. (1 *Chit. Pl.* 295. 2 *East*, 452. 4 *Mass. Rep.* 64.) 5. The legacy bequeathed to the plaintiff's (*Tole's*) wife is, by the will, charged on the land devised to the defendant, or on the devisee in respect to the land; and not on the personal property. (3 *Cowen*, 133.) 6. Parol evidence is admissible to show the situation of the testator, and his property, children, &c. at the time of his death, to aid the court and jury in arriving at his intention, and to give a proper construction to the will. (2 *Ves. Sen.* 216. 4 *John* 63. 6 *T. R.* 676. *Rob. on Frauds*, 13, 14.)

I. Selye, contra. 1. Parol evidence cannot be admitted to explain a will, unless there be a latent ambiguity. (1

Madd. Ch. 554. 2 Bro. Ch. Cas. 303.) 2. The defendant was not in possession when he promised. If not, there is a variance between the declaration and proof. The consideration must be proved as laid. (7 *John. Rep.* 321, and the cases there cited.) 3. A devisee of real estate is not bound to take it *cum onere*. And the evidence of an election to do so is, in this case, insufficient. In all the cases where a recovery has been had, of a legacy against a devisee, it appeared that the devisee had gone into possession under the will, and had, in consideration, made an express promise, or what was equivalent. (3 *John. Rep.* 189. 7 *id.* 99. 10 *id.* 30. 18 *id.* 428. 3 *Coven.* 133.) 4. The assent of the executor and executrix to the legacy should have been proved. This was stated in *Beecker v. Beecker*, (7 *John.* 99.) 5. The value of the land was a proper subject of enquiry. The judge held this immaterial, on the offer of the plaintiff to prove it. That decision was without objection by the defendant; but it shut him out from similar proof on his part. He ought not to pay beyond the value of the land.

6. The legacy is not charged upon the real estate, either expressly, or by necessary implication. It is to be paid out of the testator's estate generally; and the personal estate is the first fund to be applied. On this point, I refer particularly to *Kelsey v. Deyo, and wife*, (3 *Coven.* 133.) That case and the present are much alike in many features; but there is one striking difference. In that case, it appeared from the will itself, that all the testator's personal property was disposed of: here, only some specific articles. There is no disposition of the testator's general fund of personal property, unless the parol evidence is allowed to give a construction to the will. Even that testimony does not show the situation of the testator's personal property at the time of making the will. Its situation at any other time is of no consequence.

7. The plaintiffs' only remedy is in a court of equity.

Curia, per WOODWORTH, J. If this action can be sustained, it must be on the ground that the legacy claimed

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is charged on the estate devised, or on the defendant in respect to the estate ; that the defendant became seised, entered on the premises, and thereupon promised to pay.

In the declaration, it is alleged that the defendant entered under the will, and thereby became liable to pay, and, being so in possession, promised.

It is contended that the defendant had not taken possession when the promise was made. The evidence is, that *James Hardy*, being in possession about six months after the testator's death, the defendant gave him permission to remain on the farm devised, until the month of *May* following ; that the defendant then claimed the farm by virtue of the will ; and said he would take the land, and pay the legacies : that about a week or two afterwards, the defendant requested him to leave the farm, the then next week. The promises were made in *January* and the beginning of *February*. The defendant actually took possession about the 15th of *February*.

If possession be necessary to be proved, as well as the election of the defendant to take, I think that fact sufficiently made out. *James Hardy*, also a son of the testator, was in the actual occupancy, not holding adversely. In law, it must be considered as the possession of him in whom the title was vested. It further appears, that the defendant considered the possession as at his disposal ; and that *James* held subject to his control. The defendant gave him permission to remain on the farm until *May*. That *James* acquiesced, is fairly to be presumed ; as no objection was made on his part to the right assumed to control the possession. Afterwards, and before the promise, *James* is directed to quit. It is matter of inference that he did quit, as the defendant entered in *February*. These facts, taken in connexion, show very satisfactorily, that the defendant had possession, by his tenant, or by a person occupying subject to his direction or control.

I incline to the opinion, that this testimony supported the promise as stated in the declaration. The case of *Wells v. Prince*, (4 *Mass. Rep.* 64,) decides, that if a stranger is in possession, under, or acknowledging the ti-

tle of the devisee or remainderman, it is equivalent to an actual entry. *Parsons*, Ch. J., observed, "It is a general rule of law, that on the death of the deviser, dying seised, the devisee is not seised until entry be made for his use, or some other act done which in law is considered as having the effect of an entry." From what has been already stated, it will be perceived that the case before the court comes within the rule laid down. *James Hardy* must be considered as having been in possession under the defendant; and acknowledging his title.

If it was necessary to prove the assent of the executor and executrix to the legacy, enough was shown to establish that fact. On this point, the release of dower by *Margaret Hardy*, the executrix, to the defendant, who was the executor, may be noticed. She states that the defendant applied to her and said, if she would sign off her right, he would go on and pay the heirs. She complied; upon which he said he would then go on and take the farm. This act is a clear manifestation of assent.

But it was not necessary to prove the assent of the personal representatives. It is true that, if a man bequeaths his chattels real or personal, or gives any specific legacy, the legatee cannot enter, or take the legacy, without the consent of the executor. The reason is, because the personal estate is liable in the hands of the executor to the payment of the testator's debts. He must take care to satisfy debts before legacies. But when a man seised in fee devises, the devisee may enter without the assent of the executor; because the latter has nothing to do with the real estate. (*Co. Lit.* 111, a. 1 *Saund.* 278, n. 5.) This is the law in *England*; and the law is the same here, except that a power is given by statute, on the application of an executor, to sell lands for the payment of debts. The executor has no other control over them. He has no authority to take possession of, or hold the inheritance. Consequently the devisee need not prove his assent. Besides; in this case it appears that the debts did not exceed \$30; and the personal estate was equal to \$500. There could be no resort to the land.

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According to the principle upon which the liability of the defendant rests, the value of the farm is an immaterial inquiry, if the defendant elected to take it *cum onere*, entered into possession, and promised to pay.

The material question is, whether the legacy was charged on the land, in exoneration of the personal estate, by express words, or a plain intent of the testator.

This case bears some resemblance to that of *Kelsey v. Deyo*, (3 Cowen, 133.) Here, as in that case, the debts are directed to be paid out of the personal estate. This, I think, is manifest; as no real estate is devised to the wife of the testator, and she is directed to pay the debts. The farm is devised to the defendant; and pecuniary legacies to other children, of whom the wife (plaintiff) is one. The will says the defendant is to pay as follows; naming five of the children. It then proceeds, "also James Hardy is to have \$250, also to *Fidelia Hardy*" (the wife, plaintiff) "\$100." In my opinion the testator intended, and so the will is to be construed, that the defendant should pay the legacies. The direction at the beginning of the bequests undoubtedly applies to all; and shows pretty clearly that it was intended to charge the real estate. But it by no means proves that the personal estate was not first to be called in aid of the real. Several specific legacies of personal property are given in the will; but it nowhere appears that they included all the testator's personal estate. There is no bequest of the whole; and herein the case materially differs from *Kelsey v. Deyo*. The argument cannot be urged, that it is apparent the testator intended to charge the real estate exclusively, from the fact that all his personal property was given to others.

If then there is not enough on the face of this will, to make the legacy a specific charge on the farm, or, in other words, to exclude the personal estate from coming in aid of the real; the cause belongs to a court of chancery. A court of common law has not jurisdiction. In *Livingston v. Newkirk*, (3 John. Ch. Rep. 319,) this doctrine is fully examined. The chancellor observed, "It is too well settled to be questioned, that the personal estate is to be

first applied to the payment of debts and legacies ; and that a mere charge on the land will not exonerate the personal estate ; nor any thing short of express words, or plain intent in the will of the testator."

If such be the legal construction of this will, parol evidence cannot be resorted to, for the purpose of showing a different intent. There is no latent ambiguity. That is made out by proof of extrinsic facts, and may be removed by parol. Here the fact that the testator had no other personal property, raises no ambiguity ; but, if admissible, it is to give a construction that the farm is exclusively to be charged ; for so I am inclined to think would be the result, had the facts clearly appeared in the will. That such evidence must be rejected, is in accordance with the general current of authority. I need only mention a few cases, where it has been held that parol evidence is not admissible to show the intention of the testator, against the construction on the face of the will, and that the state of his property cannot be resorted to as a criterion to explain it ; and that generally, the will is not to be construed by any thing *dehors*, where there is no latent ambiguity. (8 *Ves.* 22. 18 *id.* 466. 1 *Ball & Beat.* 543. 1 *Mer.* 194. 3 *id.* 316.)

It is evident, then, from the rules of evidence applicable to the construction of wills, that if, on the face of this will, it cannot be collected that the charge is exclusively on the land, evidence of the state of the testator's property cannot be called to its aid. The law, in its wisdom, has established certain land marks, by which we are to be governed. The security of property depends on adhering to them. We are not permitted to lay hold of parts of a will which indicate a probable intent ; and determine according to impressions thus derived. It is necessary that the will itself should contain what the law has adjudged competent evidence of intent. In this case, it is probable the testator may have intended to exonerate the personal property ; but this intent is nowhere expressed ; nor can it necessarily be inferred. So, also, the testator may not have possessed any personal property, other than that bequeath-

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ed. His will is silent in this respect. There is, therefore, the omission of a material fact, without which, or without some other clear indication, not contained in the will, the law adjudges that the legacy is not a charge on the land exclusively.

I am of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

J. ANN M'ALLISTER, by her next friend Bulger, *against*  
 HAMMOND.

Where an injury done to another by negligence, is both direct or immediate, and consequential, the party injured has an election either to bring case or trespass.

CASE, for driving a horse and gig so negligently and unskilfully, and so ignorantly and carelessly governing and guiding the horse and gig, as to run against the plaintiff, knock her down and injure her; by means whereof she was rendered sick and lame; and put to great expense in procuring surgical, and other aid and assistance. Plea, not guilty.

The cause was tried at the *New-York* circuit, *February 13th*, 1824, before EDWARDS, C. Judge.

Thus, where the defendant so carelessly drove his horse and gig, as to run against the plaintiff, in the street, and knock her down; whereby she was injured, and became permanently lame; held, that case was a proper action.

It appeared at the trial, that the defendant was driving a gig through one of the public streets of the city of *New-York*, very fast. That the plaintiff, a child under two years of age, ran into the street after some pigs, which were running to the opposite side of the street; and was observed by a woman at the window, who, seeing the gig approach, called to the defendant to stop; which he did not do, until after the child was knocked down by the horse or wheel of the gig; and that then the mother of the child raised the wheel with her shoulder, and rescued the child, and carried it into the house, whither she was followed by the defendant, who said he took it for a pig, and if he had killed it, he could have paid for it. He regretted the accident; desired that a doctor might be sent, and promised to pay all expenses. He called the next day. The child's knee was badly in-

jured ; and notwithstanding the attendance of physicians, and careful nursing to the time of the trial, had assumed the form of a white swelling. The bones of the knee had united, the use of the joint was lost, the leg withered, and the child had become incurably lame.

The plaintiff's counsel disclaimed all attempts to fix an imputation of wilfulness on the defendant ; whose counsel moved for a nonsuit, on the ground that the action should have been trespass.

Verdict for the plaintiff for \$700, subject to the opinion of the court, on the point made by the defendant's counsel ; which was reserved by the judge.

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*D. Graham*, for the plaintiff, said there is one distinction which has never been departed from by any of the cases : this is, that where the injury is immediately consequential, trespass should be brought ; but where it is remotely so, case is the proper remedy. The doubt has been, where the damages are both immediate and consequential. In relation to such a state of facts, the cases are various. Sometimes they go on the intention with which the act is done ; at other times, on the force ; and again, on the question whether the defendant was personally engaged in it. (*Huggell v. Montgomery*, 5 B. & P. 446, and the note to that case in the late ed. *Rogers v. Imbleton*, 5 B. & P. 117. *Ogle v. Barnes*, 8 T. R. 188. *Turner v. Hawkins*, 1 B. & P. 472.) Where the consequential injury has been a sore, or wound, an action on the case has been allowed both in England and this country. (*Slater v. Baker*, 2 Wils. 359. *Adams v. Hemmenway*, 1 Mass. Rep. 145.) And it seems now to be settled in this court, indeed more clearly so than in any other, that where immediate and consequential damage both result from the injury, the party may elect to bring either trespass or case. (*Blin v. Campbell*, 14 John. Rep. 432. *Moran v. Daves*, 4 Cowen's Rep. 412.) The plaintiff may waive the immediate, and go for the consequential injury ; (*id. Cro. Jac.* 122 ;) making the latter the sole cause of

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action. (9 Rep. 50.) This doctrine is too well established by precedent to be now questioned. (4 Rep. 94.)

D. B. Ogden, contra, said he should not go into the cases on this subject. They are all cited in *Percival v. Hickey*, (18 John. 257,) where the court held, that though the injury was the result of negligence merely; yet, being immediate, the action should be trespass, not case. The only decision to the contrary is *Blin v. Campbell*. That case was cited in *Percival v. Hickey*; but it was not followed. It was decided without argument, on certiorari from a justice's court; and evidently underwent much less consideration than the more important case of *Percival v. Hickey*. If that case be law, we contend that it settles the question. This action cannot be sustained.

Graham, in reply, denied that *Percival v. Hickey* settled the question. This court merely decided, in that cause, that trespass was preferable. It does not necessarily follow, that case would not lie. Beside, in that case, and the cases relied upon to exclude an action on the case, the whole damage was immediate. Consequential damage was out of the question.

Curia, per SAVAGE, Chief Justice. It was once important to ascertain whether trespass or case was the proper action. Originally, actions of trespass involved a breach of the peace; and besides damages to the party, judgment of *capiat* was entered, upon which the defendant was taken, a fine was imposed, and he was imprisoned till he paid both the fine and the damages.

It is still important to preserve the distinction between the actions, on account of the costs and the pleadings.

Whether the one or the other action is proper, has been often a puzzling question; and decisions have not been uniform. The cases were principally reviewed by chief justice Spencer, in *Percival v. Hickey*, (18 John. 283.) In conclusion, he remarks, "I am perfectly satisfied, from a review of the cases, that if the defendant is liable at all, this action is appropriate; and that it ought to have been



trespass rather than case, as the injury was immediate, and from gross negligence."

The general principle established by this case, is, that whether trespass or case is the proper action, depends on the fact, whether the injury was immediate or consequential. Another principle is also recognized; that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass, as in *Blin v. Campbell*, (14 John. 432.) There this court held case the proper action for carelessly firing a pistol, and wounding the plaintiff's leg. And had trespass been brought in that case, the court say they would also have considered it appropriate.

In some cases either action may be maintained; as where there is both an immediate and also a consequential injury.

Whether the act complained of was accompanied with force; whether it was wilfully done; whether by the defendant himself, or through the agency of another; whether the act done was lawful; these have all been attempted as criteria by which to determine the form of the action; but have all been abandoned. (5 B. & P. note. 1 Com. Digest, Day's ed. 234, where all the learning, and all the cases on this question are collected.) There is in the last book, at page 244, an ingenious argument in favor of the indifferent use of the two actions at all events. We have the authority of Lord *Ellenborough*, for saying, "It may likewise be worthy of consideration, whether in those instances where trespass may be maintained, the party may not waive the trespass, and proceed for the tort," (3 Campb. 188,) as you may bring trover for goods taken tortiously: (3 Wils. 336.)

In this case, the injury was occasioned by the negligence of the defendant. The damages were partly immediate, but principally consequential.

I consider the case of *Blin v. Campbell*, as recognized and established by *Percival v. Hickey*; although in the latter

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case, trespass was adjudged the proper action rather than case. The courts of king's bench and common pleas in *England*, certainly do not think alike on that point ; but in the decisions of this court, there is no discrepancy. In *Per-cival v. Hickey*, the whole injury was immediate ; the destruction of the plaintiff's vessel. In the case of *Blin v. Campbell*, it was, as in this case, partly immediate and partly consequential.

Besides, the action on the case is altogether the most favorable to the defendant. He can make any defence, without the technicality of special pleading, and the plaintiff must recover a larger sum than in trespass, in order to carry costs. She has, therefore, in this instance, selected that form of action most unfavorable to herself ; and there cannot be a doubt but this recovery may be pleaded in bar to an action of trespass, should it be hereafter brought for the same injury.

In my opinion, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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GALLAGER and MASON against BRUNEL.

On demurrer to the declaration. The first count stated, that on the 9th of April, 1823, *Castro & Henriques* proposed to purchase of the plaintiffs a quantity of cotton, at a certain price ; part to be paid in cash, and part to be secured by the promissory note of the purchasers endorsed by the defendant, at 4 months ; that *C. & H.* were then unable to pay for the cotton ; and the plaintiffs there-  
An action lies for a false affirmation as to the credit of a third person, by which the plaintiff is induced to sell him goods, and is thereby injured ; but not on the ground of a parol promise to endorse for the third person, by which the plaintiff is led to the sale ; though the defendant know that such third person is insolvent at the time.

To warrant an action for a deceitful representation, it must assert a fact or facts as existing in the present tense. A promise to pay, though accompanied, at the time, with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise ; and if this be void, he has no remedy.

In assumpsit on a promise to indorse the note of another, the declaration should aver that a note was drawn and tendered for endorsement.

A sale of goods to A., on the request of B., is a good consideration for B.'s promise to pay for them. But the promise being collateral, should be in writing ; otherwise, it is void by the statute of frauds.

fore unwilling to sell all, or any part, on their sole credit ; and the defendant knew this. Yet, contriving and intending to injure and defraud the plaintiffs ; and to induce them to sell and deliver the cotton to C. & H. ; and thereby subject the plaintiffs to the loss of the balance due after the cash payment, the defendant falsely and deceitfully represented and held out to the plaintiffs, that he, the defendant, was willing to endorse the proposed note ; and with the like intent, &c. falsely, fraudulently and deceitfully encouraged and induced the plaintiffs to sell and deliver the cotton. That they did sell and deliver it, in confidence of such false, fraudulent and deceitful representation, &c : when, in truth, the defendant was then not willing, and did not mean or intend to endorse the note, or make himself responsible ; nor did he then, nor had he at any time since endorsed, or made himself legally responsible. By means whereof the plaintiffs lost the cotton and the price.

The second count averred, that C. & H. were in bad credit and unfit to be trusted, at the time of the sale. But the defendant, well knowing this ; and contriving and intending to defraud and injure the plaintiffs, and wrongfully and deceitfully to enable C. & H. to obtain the possession of the cotton, and convert it to their own use, without paying the plaintiffs for it ; falsely, fraudulently and deceitfully represented to the plaintiffs, and gave them to understand and believe, that, in case they would sell the cotton to C. & H., the defendant would become answerable to the plaintiffs, for so much as should be unpaid, by endorsing the note or notes of C. & H., &c. ; that without such representation, they would not have sold the cotton, &c. (*In other respects, this count was substantially the same as the first.*)

General demurrer and joinder.

C. D. Colden, in support of the demurrer. There is no averment that the defendant was ever required to perform. Even admitting him to be bound, his obligation was conditional ; and he cannot be made liable, till a note was drawn and tendered for endorsement.

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There was no consideration for the promise of the defendant; and if otherwise, it is a fatal objection that there was no note in writing, to take the case out [of the statute of frauds. The declaration is on an assumpsit; and it is evident, from its language taken together, that there was no note in writing; because it complains that the defendant never would render himself responsible in any way. This promise was collateral; and it is directly within the first class of promises enumerated by *Kent*, C. J., in *Leonard v. Vredenburgh*, (8 *John. Rep.* 39,) which have always been holden to be within the statute of frauds, and void.

The action cannot be sustained as one in nature of an action of deceit. I am aware that actions have been sanctioned on fraudulent misrepresentations as to the credit of another, by which vendors have suffered an injury. But these representations were always of an existing fact; that the vendee *is* worthy to be trusted; not a mere promise to pay, grounded on that fact. Besides; two things must concur to maintain the action. The defendant must not only know, or have strong reason to believe, that what he says is false; but the plaintiff must be ignorant that the vendee is unworthy of credit. Here the plaintiffs themselves aver, that they knew the vendee was not worthy to be trusted; and reposed on the promise of the defendant. They could not be deceived. They do not pretend to have been deceived.

P. W. Radcliff and G. Griffin, contra. The action is for the deceit; and no averment of consideration is necessary. But for the fraud, no sale at all would have been made. The principle of the action is well established. (6 *John.* 181. 13 *id.* 224. *id.* 325, 395. 1 *id.* 414. 3 *Ld. Raym.* 31. 1 *Campb.* 4. 3 *T. R.* 51. 3 *Bulstr.* 95. *Com. Dig. Action on the case for a deceit*, (A. 1.) 13 *Ves.* 134. 3 *Ves. & Bea.* 112.)

But we are told the representation here was promissory; that it was in the future tense. Now, is there any difference between a false representation, and a false prom-

ise? The moral demerit is the same. Knowing that *A.* is not trust worthy, we, with intention to decoy our neighbor into false confidence, say, "we will endorse his note." Is not this the strongest representation? Is it not more likely to deceive than any other mode of representation? Can any man cheat with impunity, because he does not do it in writing? If a man make an honest promise, that is quite another affair.

But if here be a promise alleged, the court are to suppose that it was in writing. The objection must be made on the trial. It cannot arise upon demurrer. (1 *Saund.* 276, a. note (2). 15 *John.* 426, per *Spencer, J.*)

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Colder, in reply. The plaintiff cannot be permitted, in this way, to turn a mere promise into a tort. The proposition laid down in the opening, that to warrant an action, the deceit must refer to present existing circumstances, is not answered by a single authority cited; nor can it be answered by authority or principle. We are referred to the old case of *Pasley v. Freeman*, (3 *T. R.* 51.) There it was, at first, very seriously doubted whether fraudulent words of the present tense, asserting an existing fact, would sustain the action. And it has not been, without a great and constant struggle, that even this case has been sustained. The case may be likened to one in the criminal law, relative to obtaining goods upon false pretences. A mere promise was never held to sustain an indictment. The pretence must be of an existing fact. It may as well be averred that a parol promise, by an executor, to pay his testator's debt, is a false affirmation; and that, therefore, he should be answerable for a deceit. Is it competent to say, that at the time of the promise, the defendant did not mean to perform?

No man reading this declaration, can doubt that this promise was by parol. The language of pleading must be understood in the same sense as that used in common conversation, where no technical words are in question.

But, if the court are to suppose the contract was in writing, we then ask, where is the consideration for the prom-

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ise ? That should have been shown in pleading. (*Rob. on Frauds*, 207, 8, ch. 3, pt. 6.)

Curia, per WOODWORTH, J. The ground of complaint is, that the defendant fraudulently and deceitfully represented and held out to the plaintiffs, that the defendant was willing to, and would endorse the note of *Castro & Henriques*, in case the plaintiffs should sell and deliver the cotton ; but that in fact he was not willing, and did not intend, nor has he endorsed the note, whereby the plaintiffs are injured. The second count alleges that *Castro & Henriques* were, at the time of the purchase, in bad credit, which the defendant knew ; that intending to defraud the plaintiffs, and enable *Castro & Henriques* to obtain possession of the cotton, he represented, that if the plaintiffs would sell and deliver, he would become answerable by endorsing for the purchasers ; that the plaintiffs did sell and deliver the cotton ; that the defendant did not intend, nor has he made himself answerable, or paid ; nor has any other person paid and satisfied the plaintiffs, whereby they were deceived, and have sustained damage.

The declaration is bad in substance ; because it does not aver that *Castro & Henriques* ever made a note, which the defendant was required to endorse. The security to be given was the defendant's endorsement. The unwillingness to endorse refers to the time the assurance was made. If, however, it continued, it does not prove the essential fact, that he actually refused when required. As to the allegation that he never has endorsed ; *non constat* that a note was ever presented for that purpose.

But as a decision upon this point alone, would be merely a postponement of the important question arising in this cause, I will consider that also.

The attempt here is, to sustain the action, not on a contract, which, if in writing, might perhaps be obligatory ; but on a deceitful representation. If the promise was in writing, I perceive no objection to its validity, inasmuch as a good consideration is stated, viz. that if the plaintiffs would sell and deliver, the defendant would endorse. If,

then, there is a binding contract existing between the parties, and on which the defendant is liable, I apprehend it is not competent for the plaintiffs to say they have an election to turn this into an action for deceit, and recover in that form, unless the case is such as to render the party liable, not only on the contract ; but, in addition, contains facts sufficient to sustain an action for deceit. For example, suppose *A.* represents *B.* to be solvent, knowing it to be false, whereby *B.* obtains credit ; but notwithstanding this representation, the seller takes from *A.* his written stipulation to guaranty the payment. In this case, I perceive no objection to a creditor's election of the remedy. The fraudulent representation of solvency would sustain the action for deceit. The written guaranty would support an action on the contract. It seems, therefore, immaterial here, whether the plaintiffs have or have not a demand which may be enforced in a different form. The question is, will the facts stated sustain an action for deceit ?

After attentive consideration, I am inclined to think the plaintiffs are not entitled to recover. However reprehensible the conduct of the defendant may appear in a moral point of view, we cannot deny to him the protection of the common law ; which does not reach cases of imperfect obligation. If this be an attempt on the part of the plaintiffs, to get rid of the statute of frauds, I can only say, the occasion justified the experiment, and calls for a patient and critical examination.

If this case is stripped of the general allegations in the declaration, of fraud and deceit, it appears to me that the gravamen is nothing more, than that the defendant encouraged the plaintiffs to sell to *Castro* and *Henriques* ; and, as surety, promised to endorse their notes. The intention of the party not to fulfil, has not, I believe, ever been considered among the fraudulent acts, which, in judgment of law, render a party liable. The maker of a promissory note may not, at the time, intend to make payment. On this note, the plaintiff may declare that the defendant intended to deceive and defraud ; but it is mere matter of form, sanctioned by precedent in pleading. The maker

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may go farther, and on the strength of assurances to pay punctually, never intended to be performed, induce the lender to part with his money, and accept the borrower's note. All this is immoral. Still the remedy is on the contract. The law has not recognized it as the substantive ground of fraud. That no cases are to be met with in the books going the length contended for, is good evidence that the doctrine is novel, and has never been acted upon.

The general ground of liability seems to rest on the affirmation of a fact as true, which, at the time, is known to be false; and by means whereof, credit is obtained. The seller, in most cases, has not the means of ascertaining the truth at the moment. He must repose on the representation, or refuse the credit. Not so here. There was no necessity of relying on the defendant's representations, or his promise. Caution required the plaintiffs to pursue a different course; to insist that the note be drawn and endorsed *pari passu* with the delivery of the goods. By dispensing with this, they omitted that prudence and care which the law presumes every man will exercise in conducting his affairs. If the plaintiffs suffer, it is owing to their negligence and misplaced confidence; for which, the law has not provided a remedy.

The general principles which govern this species of action, were ably examined in *Pasley v. Freeman*, (3 T. R. 51.) In that case, the defendant encouraged the plaintiff to sell goods; and fraudulently affirmed that the purchaser was a person safely to be trusted. The gravamen was the false affirmation of an existing fact; not a promise to do a future act, at the time not intended to be performed; and which, notwithstanding the intent, might or might not be performed. *Buller*, J. observed, "the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiffs. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practiced, its being coupled with some dealing, and the injury which it is calculated to occasion to another person." It is evident what must be the

cies of fraud, for which the law gives redress; falsehood as to an existing fact. If, as *Buller*, J. observes, every deceit includes a lie, it follows, that the representation, and promise of the defendant are not comprised within the legal acceptance of that term. The test of a lie is, that the fact asserted is not true at the time; which cannot be predicated of the facts in this case; for, although the defendant promised with the intent not to perform, it was not then false, nor could it be. It referred to an act to be done *in futuro*. Until the defendant had refused to endorse, it could not be said he had violated his promise.

The case of *Thompson v. Bond*, (1 *Campb.* 4,) was this: the plaintiff attempted to recover in *assumpsit*, for services rendered to a third person. It was not denied that the defendant had solicited the plaintiff; and promised to see him paid; but it was a collateral undertaking, and not in writing. It was held, that the action could not be sustained on this ground. But, as the defendant had made a representation to the plaintiff, that he had authority from Mr. *Sheridan's* committee, which turned out to be false, Lord *Ellenborough* observed that an action might be brought for the deceitful representation. This remark proceeded on the same ground as *Pasley v. Freeman*; that there was a false representation of a fact.

The case of *Eyre v. Dunsford*, (1 *East*, 318,) cited by the plaintiffs' counsel, was decided on the same ground. There was a material suppression of the truth; for which the defendant was held liable. The case of *Haycraft v. Creasy*, (2 *East*, 92,) turned on the ground that the representation was made *bona fide*, and with the belief of its truth. It has no bearing on this cause. In *Clifford v. Brooke*, (13 *Ves.* 131,) the lord chancellor puts the right to recover for a deceit, expressly on the falsehood of the fact alleged. He observes, "there must be knowledge at the time. That is the sound principle; that the defendant knowing the person to be dishonest, insolvent and unworthy of trust, made the representation; and that is the subject of an action, or of a bill in equity." In the case of *Upton v. Vail*, (6 *John.* 181,) there was also a

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recommendation of a person, as good, when the defendant knew he was insolvent. The doctrine of *Pasley v. Freeman* was approved, without a suggestion that the action could be maintained, when there was not knowledge of the falsehood at the time. The cases in 13 *John*. 224, 325, 395, hold the same doctrine.

I am of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

ANDREWS against KNEELAND.

On a sale by sample, the vendor is responsible, that the bulk of the commodity shall be equal in quality to the sample. ASSUMPSIT on a warranty, that certain cotton, sold by the defendant to the plaintiff, should be of like goodness and quality with certain samples exhibited: tried at the *New-York* circuit, *January 7th*, 1824, before EDWARDS, C. Judge.

At the trial, it was proved that the plaintiff, who was a merchant residing in *Boston*, on the 20th of *September*, 1821, purchased of *Smidt*, the defendant's broker, 124 square bales of cotton, by sample; the defendant and the broker residing in the city of *New-York*, where the sale took place. That the defendant consummated the sale by taking a note, in person, at his store in the city. The broker swore that he had no authority to warrant; but acted as broker for the defendant in selling a large quantity of cotton, of which the cotton in question was a part.

And it makes no difference with his authority, whether the principal reside in the same city with him, or reside abroad. It appeared not to be the general practice, in the city of *New-York*, to sell cotton by sample, though this was sometimes done.

The authority of a broker is not always confined to the power which the principal intends to confer on him; but may extend to that with which he is apparently clothed in respect to the subject matter of the sale.

The principal is bound by the acts of a general agent, provided they are within the scope of his authority. But an agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by an act beyond his authority.

Where an agent, for the purpose of a single act, is not limited as to the manner of doing it, the principal may be bound by his acts, though exceeding the authority intended to be given.

The cotton turned out to be much inferior to the sample.

The judge charged the jury, that the question whether there had been a warranty, depended not only on whether *Smidt* had made a warranty; but whether he had any authority to make one. That unless the defendant had in some way delegated that authority to the broker, the defendant could not be responsible. That if the practice in *New-York* for cotton brokers to warrant on their sales were universal, authority to warrant might be implied from this circumstance. He drew a distinction between general agents who may bind their principals by warranty without express authority, and special agents who have not this power; also between agents residing abroad, or near their principal; and charged that *Smidt*, living near his principal, was to be deemed a special agent; and had no authority to warrant, unless expressly delegated; that a power to sell did not imply a power to warrant; and that the defendant was not bound by a sale by sample, unless he knew that the sale was thus made when it was consummated by his acceptance of the plaintiff's note.

The plaintiff excepted to this charge. The jury found for the plaintiff six cents damages.

A motion was now made, in behalf of the plaintiff, for a new trial. The motion was founded on the bill of exceptions.

G. Griffin, for the plaintiff. Every sale by sample is a warranty that the bulk shall correspond with the specimen exhibited. (*Oneida Manuf. So. v. Lawrence*, 4 *Cowen*, 440.) A power of sale implies a power to warrant. (*Pal. on Ag.* 161. 3 *T. R.* 757. 4 *id.* 177. 5 *Esp. Rep.* 75. 2 *Campb.* 55.) This is uniformly so, except in the sale of land, where there must be a written power produced; (5 *John.* 58;) or where there is a fraudulent misrepresentation, which is *dehors* the authority. (7 *id.* 390.) I am not aware of any distinction between domestic and foreign principals; nor do I find any authority to support the judge in saying that an express delegation of authority

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was necessary in this case. *Colden*, senator, in *Perkins v. The Wash. Ins. Co.*, (4 Cowen, 660, &c.,) *Runquist v. Ditchell*, (3 Esp. Rep. 64,) and *Thompson, J. in The Monte Allegre*, (9 Wheat. 644,) will be found to have laid down the true doctrine on the subject.

H. W. Warner, contra. The distinction drawn by the judge between a general and special agent, was clearly law; and what he said about the difference between domestic and foreign principals, was altogether unnecessary to the case; because, let the principal reside where he would, here was no more than a special agency. The judge did not charge that there must be an express delegation of authority. He admitted that an implied one was sufficient. We, however, insist that express authority was necessary; *Smidt* being a special agent. Where an agent is employed in business of a particular kind, with power to transact the whole, it is evidence that the principal is willing he should do every thing ordinarily incidental to that branch of business. But it is far otherwise as to a special agency. This is admitted as to lands; and the same reason exists in the case of goods. In both cases the vendee must derive his title under the power. It is in business as in logic; a general agent gives you a general result. A series of instances is a good indication of his power. This may be trusted to; and what is apparently co-extensive with his power, shall not be deemed to go beyond it. Not so of a single instance. There the evidence of the power must be special. It does not follow as an inference. But in the case of a general agent, no farther evidence need be given than the fact of the general power. (*Paley on Agency*, 162, 163, 164, 166. 15 *East*, 408.) The cases cited against us are either exceptions to the rule that the power of a special agent must be shown, founded on usage, as in the instance of a servant selling a horse in 2 *Campb.* 55; or where a knowledge or recognition of the act by the principal, was to be inferred. Such is the case of *Runquist v. Ditchell*.

B. D. Ogden, in reply, said a man is to be deemed a special agent only when a power is given, and he is restricted to exercise it in a particular way. But if a power be given as in this case, to sell generally, and there be no express prohibition against a warranty, the agency is to be deemed general. This is the import of the English cases cited. And this distinction is expressly sanctioned in *Hicks v. Hankin*, (4 *Esp. Rep.* 114.) That case turned upon the distinction. The character of a special agent does not depend on the number of acts he has power to do.

Usage has nothing to do with the question.

Curia, per SAVAGE, Ch. J. The sale in this case was clearly a sale by sample. There could be no other, according to the weight of the testimony. That, however, is a question of fact.

It has been deliberately settled by this court, in the case of *The Oneida Manuf. So. v. Laurence*, (4 *Coven*, 440,) that in case of sale by sample, the vendor is responsible, that the bulk of the commodity shall be equal in quality to the sample.

It is only necessary to inquire whether the judge correctly charged the jury as to the power of the agent.

The difference between a general and a special agent is well understood. The principal is bound by the acts of a general agent, provided they are within the scope of his authority. But an agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by any act beyond his authority. (1 *Liverm.* 107-8.) Thus in *Batty v. Carswell*, (2 *John.* 48,) the authority was limited to a single act, to be performed in a particular manner. The authority was to execute a note for \$250, payable in six months. The agent gave a note payable in 60 days. This court held the principal not bound. But where the agent is not limited as to the manner of doing a particular act, the principal may be bound by his acts, though exceeding the authority intended to be given to him. Thus, in the case of *Fenn v. Harrison*, (3 *T. R.* 757. 4 *id.* 177,) the fact at first ap-

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peared to be, that the defendants had instructed their agent to get the bill discounted ; but charged him not to endorse it. He, however, did endorse it ; and though Lord *Kenyon* was inclined to hold the defendants responsible ; yet the rest of the court ruled otherwise ; and granted a new trial. Upon the next trial, it appeared that the defendants desired their special agent to get the bill discounted, without restricting his power to endorse. The plaintiff had a verdict, which the court refused to set aside, on the ground that, as the defendants had authorized the agent to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts.

The authority of a broker to bind his principal, is not, in all cases, confined to the power which the principal intended to confer on him. The interests of the mercantile world require that he should bind his principal within the limits of the authority with which he has been apparently clothed in respect to the subject matter of the sale. (*Long on Sales*, 233. 15 *East*, 38.)

In the case of *The Monte Allegre*, (9 *Wheat*. 644,) *Thompson*, justice, says, "A merchant who employs a broker to sell his goods, knows, or is presumed to know, the state and condition of the article he offers for sale. And if the nature or situation of the property is such, that it cannot be conveniently examined in bulk, he has a right, and it is for the convenience of trade, that he should be permitted to select a portion, and exhibit it as a specimen, or sample of the whole ; and that he should be held responsible for the truth of such representation. The broker is his special agent, for this purpose ; and goes into the market clothed with authority to bind his principal. In such cases, if the article does not correspond with the sample, the injured purchaser knows where to look for redress ; and the owner is justly chargeable with the loss, as he was bound to know the condition of his own property, and to send out a fair sample, if he undertook to sell in that way." This doctrine is supported by abundant authority ; and decides that the broker had power to sell

by sample ; and that a sale by sample is a warranty that the bulk shall correspond with the sample.

In this case, it is not denied that the defendant employed the broker to sell the cotton in question. His employment was a general one. There was no restriction as to the mode of sale, whether by sample or otherwise. He had authority to sell as cotton was sold in the due course of business. It appears that the most usual sales of cotton were by inspecting the bulk ; but that it was unusual to sell by sample. The broker, no doubt, however, had authority to sell by sample, if he thought proper ; and, as a sale by sample is of itself a warranty that the bulk corresponds with the sample, he was authorized, by virtue of his employment, unrestricted in the mode to be adopted by him, to bind his principal by such a sale.

Whether the principal and broker reside near each other, or far distant, seems to me not material ; as, in this case, there was no reference to the principal, except as to the mode of payment.

The cases of *Nixon v. Hyserott*, (5 John. 58,) and *Gibson v. Colt*, (7 id. 393,) contain nothing opposed to the principles I have advanced. Here there were no written instructions communicated to the party ; nor any fraud.

A new trial must be granted.

New trial granted.

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Kneeland.

OTICA,
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Every

EVERY *against* MERWIN.

v.
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Sealed articles, declared on with profert, allowed in evidence, though the defendant's name and seal were torn off; it appearing probable that this was done before the plaintiff had declared; and the mutilation not being with the plaintiff's consent.

ON motion to set aside the report of referees. The copy of the declaration served on the defendant's attorneys was in covenant on articles of agreement executed by the parties, dated *March 18th*, 1818, (with profert,) by which, in consideration that the plaintiff (*inter alia*,) had there- by *granted* to the defendant, the immediate, quiet, and peaceable possession of certain premises therein mention- ed, together with the yearly rent, that is to say, one half of the rent *then become due*, for the privileges of a fulling mill and pond, &c. the defendant did covenant, &c. with

The copy of the declaration served was, in consideration that the plaintiff, by articles of agreement, *granted* to the defendant, the immediate, &c. possession of certain premises, to- gether with one half of the yearly rent, *then become due*. The articles recited, that the plain- tiff conveyed, relinquished and gave up the premises; and then proceeded, "all of which premises the said defendant *is to have* the immediate, &c. possession of, together with the yearly rent, or that is to say, the half of the rent *to become due*, &c." The draft of the declar- ation and theoyer were right, as to the time of the rent becoming due; and the varian- ce in the copy was a clerical mistake. The cause being referred, and the articles, though objected to, being received in evidence; *held*, that there was no variance in describing the possession as *granted*; and that as to the allegation of the time when the rent became due, it not appearing that any injustice had been in fact done by the referees, the plaintiff might amend, even after a motion by the defendant to set aside the report of the referees on the ground of this variance, on payment of costs; and that the report should then be confirmed.

Whether such an amendment may be granted by a judge on the trial? *Quere*.

The amendment was granted by the court on paying the same costs as if it had been made on motion, previous to the cause being heard before the referees.

Declaration on a covenant, in articles of agreement, that the defendant, after the plain- tiff had deducted what he owed the defendant, and what the plaintiff owed one \$., if \$. would transfer the debt, would pay the remainder of a sum of 1500 dollars, in 3 equal annual payments *from the date of the articles*. The covenant was, to pay the remainder of the 1500 dollars after the deductions; to be paid in *three equal annual payments*; without saying *from the date*. *Held*, no variance; the covenant meaning that the time should run *from the date*; and being, therefore, set forth according to its legal effect.

The defendant covenanted to pay the plaintiff the remainder of \$1,500, after deducting what the plaintiff owed him, &c. In an action on the covenant, the defendant claimed that the plaintiff owed him \$106, money advanced. The plaintiff was allowed to give in evidence against the defendant, a receipt by him of a note of \$325 from the plaintiff, for collection, on which the \$106, were endorsed; and it appearing that the defendant had collected the whole \$325; *held*, that the plaintiff should be allowed the balance in the ad- justment of accounts; not as a technical set-off against the defendant's claim; but as com- ing within the provisions of the covenant.

The fact that a promissory note was seen in the hands of the maker, is *prima facie* suffi- cient, to charge one who has receipted it for collection, with the amount.

Clerical mistakes in the pleadings, may be amended, even after trial; where the party objecting to the mistake will not be injured.

And the court have strongly inclined, that a single judge may allow the amendment at the trial.

The rules of evidence are the same before referees, as before a jury. Per WOODWORTH and SUTHERLAND, Jr. interrupting *Hobbie*, *arguendo*.

the plaintiff, to pay him the sum of 1500 dollars in the following manner, that is to say : (after deducting what the plaintiff then owed the defendant, and a certain debt which the plaintiff then owed to *Samuel Scouten*, in case *Scouten* should transfer the same to the defendant,) the defendant to pay *the remainder of the said sum of 1500 dollars in three equal annual payments from the date of the said articles of agreement*. Yet the defendant had not paid, &c.

By the oyer of the articles served with the declaration, it appeared that the plaintiff conveyed, relinquished and gave up the premises mentioned in the declaration ; and the articles then proceeded : "all of which premises the said *Mervin*, (the defendant,) *is to have* the immediate, quiet and peaceable possession of, together with the yearly rent, or that is to say, the half of the rent *to become due, &c.*, which said rent is due for the privilege of a fulling mill and pond," &c. ; and then proceeded : "the said *Mervin*," (the defendant,) "to pay the before mentioned 1500 dollars, in manner following, to wit, in the first place, &c." (deductions as in the declaration,) "and then the remainder to be paid in three equal annual payments."

The cause was referred on the motion of the defendant.

The articles given in evidence before the referees, agreed with the oyer, except that in describing one parcel of the premises conveyed, &c. the oyer was, "bounded on the *north east* ;" and the articles, "on the *east*."

The variance, as to the consideration in respect to the rent, between the copy of the declaration served, and the articles ; and the variance between the oyer and the articles as to the boundary, arose from a mistake of the clerk of the plaintiff's attorneys in copying ; the draft of the declaration and a *nisi prius* record made out before the cause was referred, and the copy of the articles first made by the plaintiff's attorneys, being correct.

On objection taken for the variance, by the defendant, before the referees, these facts were offered by the plaintiff in proof ; but they refused to hear them, because they deemed the variance immaterial.

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The defendant also objected to the variance between the defendant's covenant as set forth, and as contained in the articles, in respect to the time when the installments were to become due.

The articles being produced before the referees as evidence, it appeared that the name and seal of the defendant, and names of the witnesses, were wanting. But the plaintiff proved, that when the suit was brought, the name and seal of the defendant, and the names of the witnesses, were to the instrument. Evidence was also offered as to the manner in which it was mutilated; which, with the proof of its execution, is sufficiently stated in the opinion of the court, together with such further facts as are material.

The referees reported a balance of \$557,05, for the plaintiff.

S. Sherwood, for the defendant. The execution of the contract was not sufficiently proved. But if otherwise, the several variances are fatal. (1 *Chit. P. L.* 304, 5. *Pitt v. Green*, 9 *East*, 188. *Bouditch v. Mauley*, 1 *Campb.* 195. *Hoar v. Hill*, 4 *M. & S.* 470. *Saxton v. Johnson*, 10 *John.* 418. *Bristow v. Wright*, *Doug.* 664.) In these cases, the variances were more slight than those now objected. Yet the plaintiffs were defeated by them.

The amount of the receipt claimed by the defendant, was improperly allowed.

S. R. Hobbie, contra. The objections for variance are merely technical; and should not be listened to if inconsistent with the merits. Some of the cases have gone upon very nice grounds, especially that of *Bristow v. Wright*; the authority of which was long doubted. It was, however, finally confirmed in *Peppin v. Solomons*, (5 *T. R.* 496;) and let it be taken for law. It has no application to this case. There the variance was as to the time of paying the rent; but the lease was a necessary part of the declaration. Here it was not so. The variance as to the time when the rent was payable, is in the recital of the consideration for the [defendant's] covenant. This recital is but matter of inducement. Indeed, stating any con-

sideration was not necessary. The defendant's covenant was independent. It does not profess to be upon any consideration. A covenant under seal imports a consideration in itself; and the declaration would have been good, if it had merely set forth the covenant, without allusion to any consideration whatever. The books all agree that where the words of any pleading are such mere surplusage, that they may be expunged without vitiating; where they are not matter of description, and where they need not be proved, a variance will not injure. Here, all that is said about the consideration may be stricken out, without destroying the plaintiff's right of action. If so, clearly the variance is immaterial. (1 *Chit. Pl.* 307. *Peppin v. Solomons*, 5 *T. R.* 496. *Hamborough v. Wilkie*, cited by *Gaselee*, *arg.* 4 *M. & S.* 471. *Welch v. Fisher*, 8 *Taunt.* 338. 2 *Moore*, 378, *S. C.* *Jansen v. Ostrander*, 1 *Cowen*, 671.) The case of *Wroe v. Washington*, (1 *Wash. Rep.* 357,) is this very case; and the variance was held immaterial.

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These observations and authorities apply to all the variances concerning the consideration. The legal effect of the words *is to have*, in the agreement, is comprehended in the word *grant*. In this respect, there is no variance.

Again, it appears by the affidavits, that the mistake in reciting the consideration as to the time of the rent being payable, as well as that in the oyer, were merely clerical. Proof of this was offered to the referees; and the whole may be now amended. (*Jansen v. Ostrander*, 1 *Cowen*, 670.) A trifling mistake in the oyer will not injure. (*Henry v. Brown*, 19 *John.* 49.) The party could not be surprised. The courts incline strongly to overlook slight verbal variances, when they see no evil can arise from them. (*Cockell v. Gray*, 3 *B. & B.* 177. *Arnold v. Revault*, 1 *B. & B.* 443. *Gladstone v. Neale*, 13 *East*, 410. *Munf. Index*, 565, and the cases there cited.)

The authorities cited, also apply to the variance between the declaration and agreement, as to the time when the installments became due. But there is, in this respect, no substantial variance. The agreement is set forth ac-

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cording to its legal effect. The question is, what construction should be put upon it? Good sense would say the time should run from its date; and so the referees decided. Was it to be supposed that the payment might be postponed at the will of the plaintiff? That he might take his own time to make the deduction, and then compute the time from this act? If the language be ambiguous, the construction is to be taken most strongly against the covenantor. It is enough, however, to say that the agreement was set forth on oyer, which is to be deemed a part of the declaration. If there was a variance, the defendant should have demurred. It is cured by the report, which is equivalent to a verdict. (1 *Chit. Pl.* 328.)

There is another answer to all these objections for variance. The cause was referred on the motion of the defendant. I would submit whether objections of this nature can be raised by a party before referees, appointed on his own motion.

[WOODWORTH, J. The referees must be governed by legal rules in the admission of evidence. They come in the place of a jury; and we must be satisfied that improper testimony has not been heard by them, the same as of a jury at the circuit. In this remark, SUTHERLAND, J. concurred.]

I submit, then, whether in any case, a party may take a subsequent step, by pleading over after a formal variance, going to trial, and then, for the first time, raising the objection. He should have raised it by demurrer in the first instance. The whole case was before him, on the declaration and oyer. It was a proper case for a demurrer, if the variances were material; and that was the only way in which he could take the objection. (*James v. Walruth*, 8 *John.* 410. *Douglass v. Beam*, 2 *Bin.* 76.) I may say this especially of a reference. The law does not consider referees a proper tribunal for the decision of legal questions. If it be seen by the court that such questions will arise before them, the uniform course is to deny a reference.

Curia, per WOODWORTH, J. The first objection is, that the covenant declared on was not sufficiently proved. When produced, it appeared that the names of the defendant and the subscribing witnesses had been broken off. The plaintiff proved that it was entire when the suit was commenced. It had been delivered to his attorneys, who made a copy, and returned the original to the person with whom it had been deposited for safe keeping. The depository afterwards delivered it to the defendant, where it remained a long time. After it was returned, he discovered that the names of the defendant and witnesses were missing. The execution was fully proved. For aught that appears, the mutilation may have taken place after issue joined. From the facts stated, the presumption is, that it was after the plaintiff had declared. The objection was properly overruled.

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It was then contended, that there was a variance between the contract produced, and the declaration. The latter sets out, *in consideration that the plaintiff had by the agreement, granted to the defendant, the immediate, quiet and peaceable possession of the premises, together with the yearly rent, that is to say, the one half of the rent then become due, for the privileges of a fulling mill and pond, &c.* The covenant is in these words: "all of which premises, the defendant is to have the immediate possession of, together with the yearly rent, or that is to say, the half of the rent to become due, on the premises bargained to be conveyed to Colwell and Scott, which said rent is due for the privilege of a fulling mill and pond." The word "granted," in the declaration, is intended to describe the consideration for the defendant's covenant. It will be seen, by looking at a previous part of the covenant, that it contains the following clause: "The said Richard," (the plaintiff,) "doth convey, relinquish, and give up," &c. This applies to all the premises contracted for by the defendant. Subsequently, follows the clause, that the defendant is to have the immediate possession, &c. I think the word granted, as used in the declaration, is to be understood in a popular

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sense; and not according to the strict technical meaning of the term, when used in a deed. It is an allegation, that the plaintiff had parted with his right. But even on a strict construction, the declaration is warranted by the covenant. If the plaintiff actually conveyed the premises, as the covenant states; and further added, that the defendant was to have immediate possession, he has done enough to allow the pleader when describing the transaction, to say, "the plaintiff granted the immediate possession."

With respect to the clause relating to the rent, there is a variance. By the declaration, it would seem that the defendant was entitled to one half the rent *that had become due when the covenant was executed*. The instrument itself says, "rent to become due;" having reference to subsequently accruing rent only. The oyer served on the defendant's attorney is correct in this particular. The plaintiff's attorney testifies, that the variance was a clerical mistake in copying; that the draft of the declaration, and the nisi prius record, (this cause having been noticed for trial at the circuit before it was referred,) describe the rent as in the covenant. My construction of the instrument is, that the defendant was to have one half of the rent that should thereafter accrue, on the premises which had been bargained to be conveyed to *Colwell* and *Scott*. What was the yearly rent, or at what time it commenced, does not appear. The defendant states the difference in amount, between a calculation on the basis of the rent as *then due*, and the rent *to become due*; but it is not stated how much was allowed on this account. We cannot, therefore, determine whether injustice has been done by the referees. The objection, then, is merely technical. The defendant has not been surprised. The oyer was a true copy of the covenant, which was given in evidence. On that, the plaintiff relied as the ground for a recovery. It is now the well settled practice, that the court will not allow a formal objection to defeat an action; but will suffer the party to amend in any stage of the cause. The inclination of the court has been to allow the judge at the

trial to amend the pleading objected to, when it was evident that no injury would be sustained by the party making the objection, other than the depriving him of the mere formal advantage. Such a course is approved by *Bayley, J.* in *Halhead v. Abrahams*, (3 Taunt. 81.) We have not found it necessary, that a single judge should exercise this power. We will apply the remedy even after trial, by allowing amendments in furtherance of justice, as to mistakes arising from clerical errors; provided, however, that no injury is thereby sustained by the party opposing the amendment. This doctrine is settled by the cases of *Lion v. Burtis*, (18 John. 510,) and *Jansen v. Ostrander*, (1 Coven, 670,) and in other cases not reported. In this case, the principle should be applied; as the defendant has not been deprived of any defence on the merits.

The variance between the oyer and covenant, by inserting "*north east*," in the former, instead of "*east*," as in the original, is not available; nor was it urged on the argument.

The next variance alleged is, that by the covenant, the defendant was to pay the \$1500 in manner following: in the first place, to deduct what the plaintiff owed to the defendant, and the debt the plaintiff owed *S. Scouten*, provided he should transfer it; and then the remainder, in three equal annual payments. Upon a close examination of the declaration, I do not find the objection well founded in point of fact. I think it describes the manner of payment substantially, and indeed, almost literally, as in the covenant. If it were otherwise, the only effect would be to impose on the plaintiff the costs of the amendment.

There is another objection for variance, set out in the affidavit of Mr. *Parker*, one of the attorneys for the defendant; but as it was not made a point on the argument, I presume it is not relied on.

The last objection is on the merits. In the defendant's accounts, offered by way of set-off, there is a charge of 106 dollars, advanced the 19th of *August*, 1818. In explanation of this charge, the plaintiff produced and proved

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a receipt, given by the defendant to the plaintiff, for a note or obligation against *Abraham R. Knapp*, for 325 dollars, to collect and account for. Upon the receipt was endorsed the sum of 106 dollars received by the plaintiff. It appeared that this was the money charged in the account. For the purpose of showing that the charge was paid, and reducing the balance claimed by the defendant as a set-off, the plaintiff proved that *Knapp* had given six notes to six heirs, of whom the plaintiff was one. The witness testified that he had seen all the notes in the possession of *Knapp*, the maker; and understood the concern was settled. This was certainly, *prima facie*, evidence, that the defendant had collected, or parted with the note. Nothing appears to have been offered by the defendant to resist this inference. In adjusting the account, the referees properly allowed the amount of the receipt as a credit to the plaintiff.

My conclusion is, that, as to the objection well taken for variance, the plaintiff be permitted to amend, on payment of the same costs as if the amendment had been made previous to the hearing of the cause before the referees; (a) and that the motion to set aside the report of the referees be denied.

Rule accordingly.

(a) This is the amount of costs, allowed on amendments of the like nature, by the English C. P. (*Halhead v. Abrahams*, 3 Taunt. 81.) When amendments are made at the trial, they are made without costs. (*id.*)

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GOULD against JAMES.

ON error from Queens county C. P. The action in the court below was trespass, by Gould against James, for entering the close of the former at *Lloyd's Neck*, in the town of *Oyster Bay*, Queens county, and catching, taking and carrying away oysters. Plea, that the *locus in quo* was, at the time when, &c. a navigable river, or arm of the sea; and a free fishery for any of the citizens of this state. The replication took issue on this fact.

At the trial, (Nov. 30th, 1822,) the plaintiff claimed the *locus in quo*, as belonging in fee simple to inhabitants of *Lloyd's Neck*; and proved that the plaintiff held exclusive possession of a farm under a lease from a tenant

The inhabitants of *Lloyd's Neck* claimed by prescription, an exclusive right of fishing for oysters, opposite their respective farms in an arm of the sea. In an action of trespass, by one of them, for a violation of this claim, another, interested as a remainder man

in a farm adjoining the *locus in quo* at *Lloyd's Neck*, was offered as a witness for the plaintiff; held, that he was admissible.

The inhabitants of H. claimed that the *locus in quo* was a free fishery for them. The defendant, however, an inhabitant of H., justified by plea, on the ground that it was a free fishery for all the citizens of this state. Held, that other inhabitants of H. were competent witnesses; and that too, though they had fished at *Lloyd's Neck*; and were liable to an action, if the plaintiff should succeed in establishing his right.

These witnesses had an interest in the question merely; not in the event of the cause.

A commoner cannot be a witness to support the right of his fellow commoner; but one may be a witness to support a right by prescription, in respect to another's estate, though the witness claim to prescribe in respect to his own estate, upon the same facts he is called to establish.

One may prescribe for an exclusive right of fishery in an arm of the sea, where the tide ebbs and flows. But such prescription must be clearly proved. Every presumption is against it.

A citizen of this state is a competent witness to establish a public right of fishery in all the citizens of the state.

An award of arbitrators was made between the owner of lands called L., adjoining to and bounded on an arm of the sea, where the tide ebbs and flows, on one part; and the trustees of the town of H. in this state, lying on the opposite side of the arm, of the other part; which award established certain boundaries between the parties, and decided that certain fishing ground lay within the boundaries of L. In trespass by the lessee of a part of the fishing ground, who claimed a right of several fishery therein by prescription, against an inhabitant of H., for taking fish on the demised premises; the latter justifying on the ground that the fishery was free to any citizen of this state; the plaintiff offered the award in evidence. Held, that it should not be received; that it determined nothing as to the rights claimed by the respective parties; and was therefore immaterial.

An inhabitant of a particular place, cannot be a witness, to prove a prescriptive right, common to all the inhabitants of that place.

A several fishery, in an arm of the sea, where the tide ebbs and flows, may be derived from a grant or prescription.

In trespass *quare clausum fregit*, against one, other trespassers on the *locus in quo*, or in other places, the title to which depends on the same question as that to the *locus in quo*, may be witnesses for the defendant; for the verdict will not be evidence for or against them.

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by the curtesy, in which the plaintiff covenanted to protect the shell-fish on the premises. That the farm was on *Lloyd's Neck*, and adjoining *Lloyd's Harbor*. That the fences on both sides extended from the upland to the mud at or near low water mark. That the flats between high and low water mark abound with oysters; of which the defendant, though forbidden by Mr. *Lloyd*, carried away several bushels. That the defendant said he would admit the right to the oysters to be in the proprietors of the upland, if they would permit him to take them away. It was also proved that the right to the oysters had been claimed by the proprietors of the upland at *Lloyd's Neck*, as belonging exclusively to them, in front of their respective farms. That people generally asked for them; and those who did not, were commonly prosecuted. This exclusive right had been exercised, as one witness for the plaintiff said, 13 years to his knowledge; and another said 38 years.

John L. Cogswell, who was entitled to a right in remainder in a farm at *Lloyd's Neck*, adjoining the one possessed by the plaintiff, was called by the plaintiff as a witness. The defendant objected to his admission on the ground of interest. He was rejected by the court below as incompetent; and the plaintiff excepted.

The defendant offered 4 witnesses, citizens of this state, and inhabitants of the town of *Huntington*; which lies on the west side of the neck opposite *Lloyd's Harbor*. This harbor was proved to be 70 or 80 rods wide; and it appeared that the shores on the west neck side, were within the town of *Huntington*; and free for all the inhabitants of that town. These witnesses had themselves taken oysters at *Lloyd's Neck*. They were objected to, by the plaintiff, as interested; but were received by the court below; and the plaintiff excepted. They testified as to the situation of the harbor, fences, &c. and to interruptions of the right claimed by the proprietors on *Lloyd's Neck* side.

The plaintiff then offered in evidence an award of arbitrators, made *May 30th*, 1784, upon a submission between

Henry Lloyd, then proprietor of *Lloyd's Neck*, and the trustees of the town of *Huntington*, by which certain boundaries were established, including the *locus in quo* in *Lloyd's Neck*. This was objected to, and being rejected by the court below, the plaintiff excepted.

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W. T. M'Coun, for the plaintiff in error. *Cogswell*, the plaintiff's witness, was improperly rejected. He was, at most, interested in the question, not in the event of the cause. (1 *T. R.* 302.) The record in this cause would be evidence neither for, nor against him. The prescription set up, and sought to be proved, is in the plaintiff and his reversioner, exclusive of all other persons. It is annexed to the *locus in quo*. It is not a prescription in favor of all the inhabitants of *Lloyd's Neck* in common. Hence, proof of a prescription in right of the plaintiff's close, can have no influence on the witness' claim. *Hockley v. Lamb*, (1 *Ld. Raym.* 731,) is in point. It is not the case of commoners, in which, I admit, a witness, being a fellow commoner himself, could not testify. (1 *T. R.* 302.)

The defendant's four witnesses ought to have been rejected as incompetent. They were inhabitants of *Huntington*, who claimed in common against the plaintiff. (1 *T. R.* 302. 1 *Ld. Raym.* 731. *Comp. of Carpenters, &c. v. Haycard*, *Dougl.* 374.) The verdict in this case, if for the plaintiff, would be evidence against these witnesses, as in *Reed v. Jackson*, (1 *East*, 355,) where the competency of a verdict against one parishioner, on the question of a common right of way for his parish, was received in evidence against another. Upon this principle, in trespass for fishing, against an inhabitant of *Staten Island*, an inhabitant of that place was holden an incompetent witness, to prove a common right of fishery in all the inhabitants. (*Jacobson v. Fountain*, 2 *John. Rep.* 170.)

The award offered in evidence was admissible. (15 *John.* 197. 1 *Cowen*, 117. 2 *Cowen*, 638. *Card v. Jeans*, *Mann. Dig. Witness*, c. (k) *Privies in estate*, p. 463.)

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R. Bogardus, contra. The defendant was entitled to a verdict on the plaintiff's own proof. The *locus in quo* being an arm of the sea where the tide ebbs and flows, the right of fishing was common to all. (*Hooker v. Cumming*, 20 John. 90, and the cases there cited.) If this be so, it is immaterial whether the witnesses, whose competency are in question, were received or not. Their testimony was offered with a view to the plaintiff's exclusive right; whereas, it is evident he could not have any. Neither the king nor the legislature can grant away a public fishery. (*Arnold v. Mundy*, 1 Halst. 1.)

But *Cogswell* was properly rejected. Being a remainderman of the farm adjoining the plaintiffs, the proprietors of which claimed the same exclusive right as the plaintiff and his lessor, he had a strong interest. Not so of the defendant's witnesses. They were not offered, as supposed on the other side, to establish a common right in a particular town, district, or corporation to which they belonged; but to prove a right in the people of the state at large. Surely, it will not be contended that every man in the state is disqualified to be a witness upon such a question. The doctrine of interest has never been extended so far. Neither *Reed v. Jackson*, nor *Jacobson v. Fountain*, advance such a sweeping doctrine. They relate to common rights of way or fishery in the inhabitants of particular places. In trespass for travelling on ground claimed as a public highway, was it ever heard that the whole state shall be shut out from being witnesses?

Nor was the award admissible. The defendant was not a party to it; nor did it relate at all to the subject now in controversy.

M'Coun, in reply. It is true, that where the tide ebbs and flows, the right of fishing is, *prima facie*, in the citizens of this state. But we introduced evidence to show an exclusive right in the inhabitants of *Lloyd's Neck*. The circumstance that the tide ebbs and flows, is not conclusive for the people. A prescriptive right may still exist in private persons. *Harg. Law Tracts*, (part 1, ch.

5, p. 17,) contains the whole doctrine on the subject. By this, it will be seen, that a subject may acquire an exclusive right of fishery in an arm of the sea, by grant from the king, by custom, or prescription. *Carter v. Murcot*, (4 *Burr.* 2162 to 2165, and the cases there cited,) contain the same doctrine. Several adjudications in this country have adopted the *English* doctrine. (*Adams v. Pease*, 1 *Conn. Rep. N. S.* 481. *Coolidge v. Williams*, 4 *Mass. Rep.* 140.) An exclusive right will be presumed, if it have been exercised for the length of time required by statute, to bar a right of entry. (*Ingraham v. Hutchinson*, 2 *Conn. Rep. N. S.* 584. *Shaw v. Crawford*, 10 *John. Rep.* 236. *Bealy v. Shaw*, 6 *East*, 208. *Balston v. Bensted*, 1 *Campb.* 463. *Chalker v. Dickenson*, 1 *Conn. Rep. N. S.* 582.) *Arnold v. Mundy*, it is true, denies the right of the king to grant; but admits a power in the legislature. That case does not at all interfere with prescriptive rights.

As to the defendant's witnesses, if all the citizens of the state are interested, it is not the plaintiff's fault; nor can this court grant a remedy. The defendant should go to the legislature.

Curia, per SAVAGE, Chief Justice. The first question is as to the competency of *Cogswell*. Courts have lately inclined strongly to the rule, that nothing but an interest in the event of a cause, shall disqualify a witness as interested. *Phillips*, in his *Treatise on Evidence*, (1 *vol.* 47,) says, when the issue does not affect any common right; but is merely on a right of common, claimed by prescription, as belonging to the estate of *A*, one who claims a prescriptive right of common in right of his own estate, may be a witness; for though *A* may have such a right of common, it does not follow that *B* has; nor would the verdict in the action of *A*, be evidence in *B's* action. And *Buller, J.* in *Walton v. Shelly*, (1 *T. R.* 302, 3,) says, if the issue be on a right of common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible; because, as it depends upon a custom, the record in that action would be evidence in a

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subsequent action brought by that very witness to try the same right ; therefore, there is a good reason for not receiving his testimony in such a case. But the same reason does not hold where common is claimed by prescription in right of a particular estate ; because it does not follow, if *A* has a prescriptive right of common belonging to his estate, that *B*, who has another estate in the same manor, must have the same right. Neither would the judgment for *A*, be evidence for *B* ; and yet there are cases which lay it down as a general rule, that one commoner is, in no case, a witness for another. This dictum of Mr. Justice *Buller*, is not exactly applicable to the question upon *Cogswell's* competency. Here is no right of common in controversy ; but a claim by prescription is made by the plaintiff, of a right as belonging to him in common with the inhabitants, or rather proprietors of *Lloyd's Neck*. The witness is, therefore, interested in the question ; but not in the event of the suit. He is interested in establishing the prescription ; but this may be proved as to the plaintiff, and perhaps not as to any other proprietor of *Lloyd's Neck*, in the town of *Oysterbay*. A verdict for the plaintiff, therefore, could not be used by the witness, in a suit which he might afterwards bring, for a similar trespass upon his fishery.

I think the court below erred in rejecting this witness.

Did they err also in receiving the defendant's witnesses ? The objection to those witnesses was, that they were brought to establish a right of fishery in the inhabitants of *Huntington*, they being themselves inhabitants of that town. The rule seems to be well established, that an inhabitant of a particular place cannot be sworn to prove a prescriptive right in all the inhabitants ; because that would be swearing to give himself a right there. (1 *Ld. Raym.* 731. *Doug.* 374. 1 *East*, 357.) In the case of *Jacobson v. Fountain*, (2 *John.* 175,) *Thompson*, justice, who delivered the opinion of the court, lays down the rule with great precision. "A commoner," says he, "is inadmissible to prove a right of common, unless the common be claimed by prescription in right of a particular es-

tate." In that case, the witnesses were excluded, because the right of fishing was claimed by them, not in their individual capacity, but as inhabitants of *Staten Island*. The right set up by the defendants, if it existed at all, depended on residence exclusively. And hence the distinction between all the cases cited, and this case. There is here no right of common, no right of fishery in the inhabitants of *Huntington*, any more than those of any other town in the state. The right set up by the defendant is claimed by him in his individual capacity. It does not depend at all on residence. These witnesses were no more interested than any other citizens of the state, or of the *United States*. So far, then, the court below was correct in admitting them.

But were they not interested to defeat the plaintiff's action; as, by their own testimony, it appears they were liable to an action themselves, if the plaintiff's right should be established? They would then come within the case of *The Carpenters v. Hayward*, (*Doug.* 374,) where several persons were introduced to disprove the existence of a custom in favor of the plaintiffs, that none but the members of their company should work in *Shrewsbury*, by showing that the witnesses had worked there as carpenters, without the company's license. Lord *Mansfield* said, "if the company had failed in establishing the custom, they would have been discharged from actions to which they were liable for the breach of it." The most forcible objection to these witnesses is, that they were interested to discharge themselves from actions to which they were liable as trespassers, if the plaintiff's right was established; and yet the verdict against the defendant could not be used in an action against the witnesses. The general rule is, that a verdict cannot be evidence for either party, in an action against one who was a stranger to it; who had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment. (1 *Phil. Ev.* 247. 14 *John.* 80, 1.) I think this case is not an exception to that rule.

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The witnesses were, therefore, no otherwise interested than any other persons, in the event of the suit ; and, of course, were competent.

The award, I think, was properly excluded as irrelevant. It purported [merely to establish the line between *Lloyd's Neck* and *Huntington*, which, in my judgment, was immaterial.

The court below having erred in rejecting the testimony of *Cogswell*, the judgment must be reversed, and a new trial granted ; unless, indeed, as it is contended for the defendant, the plaintiff, from his own showing, cannot recover upon a further trial. It is urged by him, that the plaintiff cannot recover, because the *locus in quo* is an arm of the sea, where the tide regularly ebbs and flows ; and because, in such case, the right of fishing is common to all. The law on this subject, is truly laid down by lord *Mansfield*, in *Carter v. Murcot*, (4 *Burr.* 2164.) "In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides ; and it generally extends *ad filum medium aquæ*. But in navigable rivers, the proprietors of the land on each side, have it not ; the fishery is common ; it is *prima facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him, unless he can prove such a prescriptive right." This is the acknowledged law of *Great Britain*, and of this state. (3 *Caines*, 318. 2 *John.* 175. 10 *id.* 236. 17 *id.* 210. 20 *id.* 98.) So in *Connecticut*. (1 *Conn. Rep. N. S.* 384. 2 *id.* 483.)

The case of *Jacobson v. Fountain*, is an instance in which the plaintiff proved a prescriptive right to the fishery opposite his soil. Such a fishery may be the subject of a grant. Of course, it may be claimed by prescription.

The plaintiff is bound, in such case, to make out his right. Every presumption is against him. He must, therefore, establish his prescriptive right by satisfactory proof before he can recover.

Judgment reversed, and a *venire de novo* awarded.

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JACKSON, *ex dem.* J. S. & W. BROWN, *against* BETTS. (a)

EJECTMENT for lands in the town of *Brunswick*, *Rensselaer* county, on a joint and several demise, from all and each of the three lessors; tried at the *Rensselaer* circuit, *July 9th*, 1824, before *BETTS*, C. Judge.

On the trial, the lessors claimed as devisees, not as heirs of *Benajah Brown*, deceased; and the defendant admitted that the lessors were the children of *Benajah Brown*, who died seised of the premises in question, in *May*, 1822.

The plaintiff then called *James Mallory*, who swore that on the 9th day of *November*, 1816, he received from *Benajah Brown*, his will, to keep for him, &c.

In ejectment, the plaintiff claimed under a will which could not be found. He proved that the testator made a will, several years before his death; and deposited it with M. for safe keeping. The testator afterwards took it back, for the avowed purpose of

adding a codicil; which he did about the 7th of *July*, 1821. On the first day of *March*, 1822, his daughter saw a paper in his desk drawer, which she had no doubt was his will. Between that day, and his going a journey to visit his son, which was in the *April*, next following, she saw him take some papers from the desk, and burn them; but did not know and could not say they resembled the will. She saw him also several times engaged at the desk in arranging his papers, a bundle of which he placed in his trunk. She perused the paper but partially and hastily, &c. She was, however, satisfied that it was her father's will, and stated several circumstances calculated to identify it with the will and codicil proved to have been executed; and she stated other circumstances which had a contrary tendency. The testator died in *May*, 1822. The judge, at the trial, deeming it necessary to show the existence of the will subsequent to the execution of the codicil; and that this was not satisfactorily done by the daughter's testimony, nonsuited the plaintiff.

Held, (without deciding whether the judge was correct in holding it necessary to show the existence of the will at any time after adding the codicil,) that there was sufficient evidence upon this point to go to the jury; and that it should have been submitted to them, as well upon this question, as that of revocation; that the plaintiff, therefore, should not have been nonsuited.

The declarations of a testator, as to the existence of his will, and the place where it may be found, are inadmissible in evidence, though made in *articulo mortis*.

A party in a cause, (e. g. a lessor in ejectment,) is admissible as a witness, to show the loss of a will under which he claims, in order to let in secondary evidence of its contents.

If a subscribing witness to a will, show it duly executed, though he has forgotten who one of the witnesses was, this is sufficient proof of the execution.

Diligent search for a will at the last place of abode of a testator, in a desk where he usually kept his papers, and failure to find his will there, *held*, a sufficient ground for letting in parol proof of its contents, though he died abroad.

(a) This cause was decided in *May* term last.

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The plaintiff having given notice to the defendant, to produce the will and codicil of *Benajah Brown*, which he did not do, next proceeded to the proof of their loss. For this purpose, *J. Brown*, one of the lessors, was sworn; and testified, that about a week after *Benajah Brown's* decease, he went to his house in *Brunswick*, where he had last, and for many years resided, to obtain possession of the will. That the witness made search for it, in the desk where his father said he had left it; but could not find it. He found the key of the desk. It was locked; but in such a situation that it could be opened with other keys. His father died at the witness' house in *Poundridge*, *Westchester* county, about 130 miles from *Brunswick*. *Nancy Ayres*, a daughter of *Benajah Brown*, was then sworn as a witness for the plaintiff; and testified that she lived with her father, when he went from *Brunswick* to *Poundridge*, which was in *April*, 1822. On the 1st day of the next preceding *March*, she saw an article in a small drawer in the desk of her father, at his house in *Brunswick*, purporting to be his will; and had no doubt it was his will; read enough of it to see how the daughters were provided for. After that, and a few days before he went from home, she saw him take some papers out of the desk and burn them; but did not know, and could not say they resembled the will. She never examined the desk afterwards. Intermediate her seeing the will and his going away, she saw him several times engaged arranging his papers at that desk; whence he took a considerable bundle of papers, and put into his trunk. Mr. *Mallory*, called again, swore that he was one of the subscribing witnesses to the will, and *Wm. L. Marcy*, Esq. was another. Mr. *Mallory* swore to the due execution of the will; but could not remember who was the third witness. That some years after the will was executed, the deceased called for, and took it, stating that he was going to his son *James'*; and was about to make some alterations, or make a codicil to his will. The will was written on one sheet of letter paper; and the witness thought it was not slit.

The plaintiff then offered parol evidence of the contents of the will. This was objected to, because sufficient proof had not been given of its existence at the time of the testator's death. The judge said his opinion was, that if the will had been destroyed before the testator's death, though without his knowledge, it was not a valid will. But, on this point, the verdict had better be taken subject to the opinion of the court. That he thought the testimony too slight to repel the presumption that the testator destroyed the will. But for the purpose of bringing the whole matter in dispute before the supreme court, he would receive the testimony subject to the opinion of that court. The defendant then objected to the proposed testimony, on the ground that the execution of the will was not sufficiently proved, till the names of all three of the subscribing witnesses should be disclosed.

Ezra Lockwood was then called, who testified, that about the 7th of July, 1821, the deceased brought to the witness' dwelling house in *Poundridge*, a paper purporting to be his last will, on one sheet of letter paper, not slit or cut open, witnessed by Mr. *Mallory*, Mr. *Marcy*, and another whose name he did not recollect; and requested the witness to write and add a codicil, which he did; and his impression was, that it was attached to the will by a seal. The codicil was properly attested to pass real estate. The witness then sealed up the will and codicil, and gave them back to the deceased. The codicil altered the will merely by placing some of the devisees under the care of a trustee. *Nancy Ayres*, again called, did not recollect there was more than one paper; saw the seal of the wrapper was broken open; opened it, and saw the will; there might have been an article attached to it; presumed there was more than one sheet of the will; but whether it was attached together, she could not say. *James Brown* was named executor. She did not read the will through. Mr. *Marcy* swore to substantially the same facts as Mr. *Mallory*. The former drew the will. Mr. *Lockwood*, called again, said he thought the codicil was written on one page

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of half a sheet ; and it was his impression that it was written to read by turning over the leaf.

The plaintiff then offered an authenticated record of the will of the deceased, exemplified under the seal of the surrogate of *Rensselaer* county. The judge rejected the evidence.

Nancy Ayres, called again, stated that there was no whole sheet of paper of the will. The paper was held, or attached together at the top by something. Did not know how far she read the paper ; and had no recollection that she turned over and examined the second page ; believed she examined it carelessly ; and looked it through ; but has no recollection that she did. If her father's name was to the paper, she probably saw it ; but has no recollection that she did. She might have had it in her hand a minute ; but did not know ; thought there was written on the cover, "The last will and testament of *Benajah Brown*." Did not know how many folds or pieces of paper the will consisted of.

The judge then ruled, that the testimony failed to show satisfactorily, that the paper seen by *Mrs. Ayres*, *March 1st*, 1822, was the will spoken of by *Messrs. Mallory, Marcy*, and *Lockwood* ; and that if proof of the codicil was to be considered proof of the execution of the will ; yet the plaintiff could not be permitted to show the contents of the latter, without first giving evidence of its existence, after it was delivered by *Mr. Lockwood* to the deceased in *July*, 1821.

The plaintiff then offered to prove the declarations of the deceased, made on the day he was taken ill, before his last sickness, that in *April*, 1822, when he left his house in *Brunswick*, he left his will and codicil mentioned by *Mr. Lockwood* in the drawer mentioned by *Mrs. Ayres*. That in *April*, 1822, he applied to *Mr. Lockwood* to write another codicil, of the description mentioned by *Mr. Lockwood*. That the deceased repeatedly declared, during his last illness, and *in articulo mortis*, to *Brown*, the executor, that he had left his will and codicil

in his desk at *Brunswick*; and stated where the key was left.

This evidence being objected to, was overruled by the judge, who directed a nonsuit to be entered; the plaintiff having no farther evidence.

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J. P. Cushman, for the plaintiff, moved to set aside the nonsuit, and for a new trial. He said the execution of the will was sufficiently proved; and there is no sufficient evidence of its revocation. (*Dan v. Brown*, 4 *Cowen*, 490. 4 *Burr*. 2514.) *James Brown* was a competent witness to prove the loss; and this was sufficiently established by his testimony. (4 *Cowen*, 491.) Search was made in the place where the will was, most probably, to be found; (*Jackson v. Hasbrouck*, 12 *John*. 192;) and whether a bundle of papers was, or was not in the trunk at *some time*, cannot be material. If reasonable diligence be shown, it is enough. (*id.*) The judge erred in excluding proof of the contents of the will. It was not necessary to prove, that it had been seen after it was handed by *Lockwood* to the testator. (*Dan v. Brown*, 4 *Cowen*, 490.) But if otherwise, it should have been put to the jury to judge of the weight of *Mrs. Ayres'* evidence, as to the identity of the paper she examined. It was a question of fact. The judge also erred in requiring proof of the third witness. (*id.*)

J. Paine, contra. The evidence shows that the deceased destroyed his will, if he ever made one. But if otherwise, the search proved was not sufficient to warrant a presumption of loss. Search should have been made in the testator's trunk, as well as in his desk. The declarations of the deceased were properly excluded. (*Dan v. Brown*, 4 *Cowen*, 490.) Notice to the defendant to produce the will and codicil could have no effect. There was no evidence that he ever had them in his possession. The exemplification from the surrogate's office, was properly rejected. (1 *Phil. Ev.* 433, 1 *Am. ed.*) The plaintiff was not prejudiced by the decision, that the third wit-

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ness must be disclosed. That defect was afterwards supplied; the decision went for nothing, therefore; and can be no reason for setting aside the nonsuit. (3 *John. Rep.* 528. 10 *id.* 447.) The mere facts that the testator made a will, which could not be found after his death, are not sufficient to establish it. The legal inference is, that the testator destroyed it himself.

Curia, per SUTHERLAND, J. The judge nonsuited the plaintiff, on the ground that there was not sufficient evidence of the identity of the will drawn by *Marcy* in 1816, and proved by him and *Mallory* and *Lockwood*, and that seen by *Mrs. Ayres* in the desk of the testator, in *March*, 1822: that parol evidence of the contents of the will drawn by *Marcy*, could not be received; inasmuch as there was no evidence of its existence subsequent to *July*, 1821, when *Lockwood* drew a codicil for the testator, which, after it was duly executed, was attached to the will, and both delivered by him to the testator.

There certainly was evidence enough upon this point to go to the jury; and I think the learned judge erred in not submitting it to their determination. It was a question of fact, which it was their peculiar province to decide.

Whether the will of the testator was among the papers which *Mrs. Ayres* testified that her father burned in *March*, 1822, before he went to *Westchester*, should also, I think, have been submitted to the jury. The evidence upon that point, is of such a character, that we should not disturb any conclusion to which the jury might have come.

The declarations of the testator during his last sickness, as to the existence of his will, and the place where it would be found, were incompetent evidence, and were properly rejected by the judge. This point was decided in *Dan v. Brown*, (4 *Cowen*, 490,) in relation to this very will. (And *vid.* 3 *Barnw. & Alders.* 489. 2 *John.* 31. 2 *Phil. Ev.* 197, and the cases there cited.)

It was also decided in *Dan v. Brown*, that it was not essential to the due proof of the will, that the name of the third witness should be ascertained: the fact that it was attested by three witnesses, having been established.

Assuming the execution of the will, and its existence at the time of the testator's death, to have been established; the evidence of its subsequent loss, or destruction, was sufficient to let in parol proof of its contents. Diligent search was shown to have been made, where it was most likely to be found; in the desk of the testator, where he kept his papers, at his usual place of residence. This was *prima facie* sufficient. (4 Cowen, 491. 12 John. 192.)

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On these grounds, a new trial must be granted, with costs to abide the event.

New trial granted.

END OF AUGUST TERM.

1



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF NEW-YORK,**  
**IN OCTOBER TERM, 1826, IN THE FIFTY-FIRST YEAR OF**  
**OUR INDEPENDENCE.**

GAILLARD and GRAVILLON *against* SMART.

THE plaintiffs having sued the defendant for a large sum of money in assumpsit, and holden him to special bail; one of their attorneys afterwards gave parol notice to the clerk of the attorneys for the defendant that the suit had been discontinued; and offered to pay the costs. The clerk requested a formal discontinuance; but the attorneys for the plaintiffs told him this was not necessary. The costs were never demanded of the plaintiffs; but the defendant paid them to his attorneys; and, with the consent of the special bail, went to *Europe*, where he still continues. The plaintiffs afterwards proceeded with the suit, no rule for discontinuance having been entered. And now,

An attorney may discontinue a suit, in virtue of his general power as attorney on record.

The attorney for the plaintiffs told the attorney for the defendant, that the cause was discontinued; and being requested by the latter to enter a rule to discontinue, said this was not necessary; and in consequence, the defendant, with the consent of his special bail, went to *Europe*; whereupon, no rule being entered, the

*H. Bleeker* moved for a rule that the cause be discontinued; or at least, that an *exoneretur* should be entered on the bail piece.

*S. A. Foot*, contra, read an affidavit of one of the plaintiffs, that their attorneys had acted without their authority;

plaintiffs afterwards proceeded with the cause. On motion, the court ordered a discontinuance to be entered.

## CASES IN THE SUPREME COURT

that he, (the deponent,) had merely given the defendant leave to go to *France*, on his encouragement that this would enable him to make a satisfactory arrangement of the plaintiffs' demand; and that the deponent had instructed his attorneys to suspend the suit; not to discontinue it. And that it was never the intention of either of the plaintiffs that the suit should be discontinued.

He contended that the attorneys could not discontinue without a special authority for that purpose. In this case, it operated to destroy the remedy, which is a part of the contract. It is equivalent to a release or retransit, a receipt or entry of satisfaction: neither of which are acts which an attorney can do, without special authority, unless the money be, in truth, paid to him. (*Kellogg v. Gilbert*, 10 *John. Rep.* 220 to 222, and the cases there cited.) Nor can he give a *cognovit*, without authority. (*Denton v. Noyes*, 6 *John.* 296.)

[WOODWORTH, J. The cases which you mention, are those in which the right would be concluded. This is a mere discontinuance. Another suit may be commenced.]

In effect, the right is concluded. The defendant is beyond the reach of process. The statute of limitations has begun to run; and will continue till the debt is discharged, notwithstanding the defendant is abroad.

As to the bail, they took the risk of the defendant's going abroad; and if they will trust to a discontinuance without authority, they should take the consequence; not the plaintiffs. Beside, their application is premature. They should have waited to see if there will be a judgment.

*Bleecker*, in reply. The question is, whether the clients of the attorney are to abide the consequence of his unauthorized acts, or whether they shall be visited on the opposite party. Here is no discharge of the cause of action; but a step in the ordinary course of practice. Suppose an attorney suffers a nonsuit; or puts in a plea not adapted to his client's defence; clearly, the latter must be concluded. A discontinuance is no more; and indeed not

so much. An attorney may, under his general power, in a variety of ways, absolutely conclude the rights of his client. Are we to suffer because no rule was actually entered? That it was not, is the fault of the plaintiffs' attorneys. This is not the case of an agreement, which must be in writing by the 12th rule of *April* term, 1796. It is the case of a notice that the suit was discontinued; and a waiver of the rule, or formality of actual discontinuance.

This is a totally different case from a retraxit or release, as remarked by his honor, judge WOODWORTH.

At any rate, the bail must be discharged on the plaintiffs' own showing. They have licensed the principal to go beyond the reach of his bail.

*Curia, per SAVAGE, Ch. J.* It is worthy of remark, that only one of the plaintiffs makes an affidavit, denying any special authority in their attorneys to discontinue; and if this were the question, I think we ought at least to intend, that the attorney would not act without such an authority, till the contrary is clearly shown by both.

But I do not think a special authority was necessary. *Denion v. Noyes* is relied on; but, as I understand that case, it is an authority in favor of the right to discontinue under the general power of the attorney. It was there held, that a judgment confessed by an attorney of this court, without process, was regular; and the court said the defendant must look to the attorney for his damages, if he had sustained any. It is true, this being such a strong act of the attorney, the court allowed the party to come in and plead; the judgment standing as security. They cite various cases, showing that, usually, if the client is prejudiced by the misconduct of his attorney in the course of the suit, he must take his remedy against the attorney. *Van Ness, J.* who dissented, conceded that if a suit had been regularly commenced, the confession would have been conclusive, unless the attorney had been insolvent. Taking the rule as laid down by him, which is certainly the most favorable to the plaintiffs;

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Anonymous.

and still we must hold the discontinuance regular, if it had been actually entered. What has been done, is clearly equivalent to an actual discontinuance. The defendant's attorneys requested a rule to be entered; but the formality was waived. This is not the case of an agreement within the rule which requires a writing between the attorneys. Where an attorney is retained, we will not look for a special authority to do so ordinary an act of practice as the discontinuance of the cause. True, his general power does not extend to a retraxit or release; because they relate to the cause of action itself; not merely to the remedy which he is retained to conduct. But he may do all ordinary acts in the prosecution of the suit; or the final disposition of it.

Besides, here were instructions given to the attorney to suspend the suit. This is admitted by the plaintiffs. If these instructions have been misconstrued by the attorneys, it is better that their clients should suffer, than the opposite party.

On the whole, we think a rule to discontinue must be granted; and this precludes the question as to the exoneretur. The bail are relieved as a consequence.

Rule to discontinue granted.

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ANONYMOUS.

The affidavit upon which to move for judgment as in case of nonsuit, must show there has been a circuit at which the plaintiff might have tried his cause.

The court will not take judicial notice that there has been such a circuit.

W. MULOCK moved for judgment as in case of nonsuit, for not proceeding to trial at the last circuit in the county of *Delaware*.

*J. L. Tillinghast* objected, that it did not appear by the affidavit on which the motion was founded, that there had been any circuit in *Delaware* since the cause was put at issue.

*Mulock* suggested, that the court would take judicial notice that there had been such a circuit.

*Curia.* We have often held otherwise. Before you can move for judgment as in case of nonsuit, you must show by your affidavit affirmatively, that there has been a circuit at which the plaintiff might have tried his cause. Till this is shown, it does not appear that he was in default.

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Anonymous.

Motion denied.

ANONYMOUS.

J. A. COLLIER, for the defendant, moved to change the venue in this cause, on the ground that a greater number of witnesses resided in the county to which he sought to change it, than in the county where the venue was laid.

The affidavit for a motion to change the venue, must state the names of the witnesses.

H. STEPHENS, contra, objected that the affidavit upon which the motion was founded did not name the witnesses; nor state that, as the defendant was advised by counsel, and believed, he could not proceed to trial without their testimony.

And also, that, as the party is advised by counsel, and believes, he cannot safely proceed to trial without the testimony of each of them.

*Curia.* For both reasons, the motion must be denied. Owing to the looseness of the practice in these respects, heretofore, parties have taken very great latitude in stating the number of witnesses on both sides. We think it proper to require that they should not only name their witnesses; but we now require them to swear that, as they are advised by counsel, and believe they cannot safely proceed to trial, without each of the witnesses named.

Motion denied with costs.

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Cobb  
v.  
Darrow.

ANONYMOUS.

On setting aside a default for want of a plea, on the ground of merits, if it appear probable that the plaintiff may lose his demand by reason of the defendant's being in doubtful circumstances, the court will order the judgment to stand as security; and grant a rule that the defendant may plead and go to trial, on payment of costs.

This means not only the costs of resisting the motion; but also of the default, and all subsequent proceedings.

J. A. COLLIER, for the defendant, moved to set aside a default for want of a plea, on the ground of merits.

H. P. Hunt, contra, read an affidavit showing that, by reason of the defendant's doubtful circumstances, the plaintiff would be in danger of losing his debt, unless the judgment was suffered to stand as security.

Curia. Let the defendant plead and go to trial on payment of costs; the judgment to remain as security.

Collier. Do the court mean the costs of resisting the motion merely; or the costs of the default and subsequent proceedings also?

Curia. Both must be paid. The plaintiff is entitled to them as a consequence of the default; and at all events. Were this otherwise, the plaintiff would lose these costs altogether, if he should not succeed. We do not mean his obtaining them should in any way depend on the event of the suit.

Rule accordingly.

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COBB and MORRIS *against* DARROW.

The plaintiff has a right to act on a notice of bail, received from an attorney of this court; though he may not have been retained, and though bail may not be in as stated in the notice.

AN attorney, without any authority from the defendant, gave notice to the attorneys for the plaintiff, that special bail was in for the defendant. On this notice, and 4 days after, the plaintiff's attorneys entered the defendant's default.

And though no bail was, in fact, in, as the notice stated; and was not filed till some time after, and by another attorney;

The Court refused to set aside the proceedings for irregularity; saying the plaintiffs had a right to act upon the notice.

ALBANY,  
Oct. 1826.

Jackson  
v.  
Stiles.

D. Cady, for the motion.

H. P. Hunt, contra.

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JONES against SPICER.

THIS cause was removed by *habeas corpus*, returnable the 19th day of August last. The writ being returned and filed on the 7th of August, before the return day, the plaintiff took the usual rule to appear, and gave notice. The defendant not appearing pursuant to the rule, the plaintiff entered a rule for a *procedendo*; which

A rule to appear upon a *habeas corpus*, cannot be taken before the return day, though the writ be actually returned when the rule is entered.

W. Mulock now moved to set aside as irregular.

M. Ulshoeffer, contra.

Curia. The plaintiff has proceeded irregularly. A rule cannot be taken upon process till the return day. It is so of rules to bring in the body on writs of *capias*; and the same of a *habeas corpus*.

Motion granted.

---

JACKSON, *ex dem.* Farmers' Turnpike Co. against  
STILES, Wild, tenant.

A. L. JORDAN, for the tenant, moved for leave to enter into the consent rule specially, on his affidavit, "that he, this deponent, claims as tenant in common; and that he is advised by counsel, and believes, that he is tenant in common with the lessors of the plaintiff."

He cited *Jackson v. Stiles*, (2 Cowen, 585.)

An affidavit that the tenant "claims as tenant in common with the lessors of the plaintiff; and that, as he is advised by counsel,

and believes, he is tenant in common" with them, is sufficient to entitle him to enter into the consent rule specially.

ALBANY,  
Oct. 1826.

*W. Fraser*, contra, objected, among other things, that the affidavit was too loose and general.

Ex parte  
Bacon.

*Curia.* We think it is sufficient. The form agrees with that required in the case cited.

Motion granted.

---

JACKSON, *ex dem.* Vroman, against VROMAN.

Notice of motion for judgment as in case of nonsuit, cannot be given, till after the circuit at which the plaintiff is bound to try has passed, though he entirely omit to notice his cause.

C. Y. LANSING, for the defendant, moved for judgment as in case of nonsuit, for not going to trial at the last *Schohaire* circuit, pursuant to stipulation. He read an affidavit, the *jurat* of which was dated the 16th of October, stating that no notice of trial was, on that day, at the time of making the affidavit, received for the circuit, which was to be holden on the 23d of October. And he said the plaintiff was in default. He had let the time pass for noticing. It was impossible for him to try; and should be considered in the same light as if a circuit had passed, and the cause in fact not tried, through the plaintiff's fault.

*I. Seelye*, contra, said the application was premature. The cause might yet have been tried by arrangement between the parties; or the circuit might have fallen through. The plaintiff is not completely in default till his cause has been, or might be, called on the calendar.

And of this opinion was *the Court*.

Motion denied.

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*Ex parte* BACON and LYON.

Setting aside a judgment by default in a court of common pleas, is matter of discretion with that court.

And this court will not interfere on such a subject by mandamus.



*Taylor*, defendant, on the ground of merits, on payment of costs.

And this court were now moved that a mandamus issue, commanding the C. P. to vacate that rule.

ALBANY,  
Oct. 1826.

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Bennett
v.
Davis.

B. S. Doty, for the relators.

The motion was not opposed ; but

Per Curiam. The common pleas must be their own judges, upon the circumstances before them, whether they will set aside a default upon the merits. This is so much a matter of discretion, that we will not interfere by mandamus. The granting or refusal of such an application, is governed by no fixed principles. No positive rule of law has been violated by the court below ; nor can we fix bounds to their discretion upon this subject.

Besides ; upon the circumstances disclosed here, we rather think we should have set aside the default in question on our own rules of practice. But upon this we give no opinion.

Motion denied.

BENNETT *against* W. M. DAVIS and N. DAVIS.

JUDGMENT for the plaintiff was rendered against both the defendants, on bond and warrant of attorney. At a previous term, the judgment had been set aside as to *N. Davis*, for irregularity in its entry, on grounds mentioned in the report of the same case, in 3 *Cowen*, 68.

And now it was moved that the judgment be also set aside as to *W. M. Davis*, on the ground that he was an infant when the bond and warrant of attorney were executed.

A warrant of attorney by an infant, to confess judgment is void ; and a judgment entered in virtue of it will be set aside on motion.

W. H. Maynard, for the motion, cited 1 *H. Bl. Rep.* 75 ; *Dunl. Pr.* 359 ; *W. Bl. Rep.* 1133 ; *Bing. on Judg.* 42 ; 1 *Dall.* 122.

ALBANY,
Oct. 1826.

G. C. Bronson, contra.

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Lown  
v.  
Roose.

*Curia.* The warrant of attorney was void as to the infant; and the judgment must, therefore, be set aside.

Motion granted.

---

Lown *against* ROOSE.

On a rule for "judgment as in case of a nonsuit, unless the plaintiff shall stipulate and pay costs," the plaintiff must stipulate *instantly*, or at least within 20 days; or the defendant may perfect his judgment without demanding costs.

IN *May* term, on the 26<sup>th</sup> of *May* last, a rule was moved for, and taken against the plaintiff, for "judgment as in case of nonsuit, unless the plaintiff shall stipulate and pay costs." But no stipulation was served by the defendant's attorney till the 16<sup>th</sup> of *June* thereafter.

The defendant's attorney having taken judgment as in case of nonsuit against the plaintiff.

A motion was now made, in behalf of the plaintiff, to set it aside; and one question was, whether the stipulation was in sufficient season to comply with the rule. No demand of the costs by the defendant's attorney had been made.

*J. W. Wheeler*, for the motion.

*J. L. Wendell* and *G. A. Shufeldt*, contra.

*Curia.* The obligation to demand costs on the rule *nisi*, for judgment as in case of nonsuit, does not attach till a stipulation be actually given. Here was a delay of more than 20 days to give the stipulation. On a rule of this kind, the stipulation must be given, at least, within 20 days from the rule; and we think *instantly*; or the defendant may proceed and perfect his judgment of nonsuit. The motion must be denied.

Motion denied.

ALBANY,  
Oct. 1838.Ontario Bank  
v.  
Baxter.THE PRESIDENT, DIRECTORS AND COMPANY OF THE ON-  
TARIO BANK *against* BAXTER.THE SAME *against* THREE OTHERS, in three several causes.

THESE were separate actions on the same promissory note, against the several defendants, as maker and separate endorsers.

All the causes being noticed for trial at the last *Oneida* circuit, they were ordered by the circuit judge to be put off, on payment of costs. These were taxed at the full costs of the circuit in each cause. The defendant refused to pay according to the taxation; insisting that he was bound to pay full costs in only one of the causes, and disbursements only in the others, and claiming that the statute of April 21, 1818, (*sess.* 41, c. 259, s. 6,) extended to the case. He accordingly tendered this amount to the plaintiffs' attorney. The latter, claiming the full costs in all the causes, moved the three for trial, in which disbursements only were tendered, and took inquests.

An objection to this course was made to the circuit judge; and he was moved to order a re-taxation. He replied, that the costs having been taxed by a competent officer, must be paid; that he had nothing to do with the taxation; and the supreme court only could afford relief on this head. He accordingly suffered the inquests to be taken.

An affidavit of merits was now made by the maker, in the three causes, which were against the endorsers. He swore that he was acquainted with the defence in each cause; and that it was the same in each of the four causes.

On these facts,

A motion was made to set aside the inquests for irregularity: and that the costs be re-taxed.

*R. Cossett*, for the motion.

*C. P. Kirkland*, contra.

The statute, (*sess.* 41, ch. 259, s. 6,) regulating the costs in several suits on the same note, &c. applies to the general, not the interlocutory costs of the cause; *i. e.* the costs of putting off a cause at the circuit.

Where several suits are brought against the maker and endorsers of a note, an affidavit of merits to set aside an inquest in all the causes, may be made by the maker; he being acquainted with the facts, and the defence being the same in all the causes.

ALBANY,  
Oct. 1826.

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Munro
v.
Baker.

Curia. This motion cannot be granted, on the ground of irregularity. The statute, (*sess.* 41, *ch.* 259, *s.* 6,) regulating the costs of several suits on the same instrument or note, &c. against maker and endorsers, &c. applies only to the general, not to the interlocutory costs of the cause.

But there is an affidavit of merits. It is objected that this is made by the maker, who is not the nominal defendant in the three causes. He is, however, a party to the instrument; and asserts his acquaintance with the facts in each cause; and that the defence is the same in all. We think this sufficient, and grant the motion to set aside the inquests, on payment of all the costs.

The motion to re-tax is denied.

Rule accordingly.

MUNRO *against* BAKER and OTHERS.

Cause must be shown for a certiorari, in all cases where it is to review the proceedings of an inferior jurisdiction for error; except where the writ is sued out by the people.

A WRIT of certiorari had issued in this cause, in behalf of *Munro*, to remove into this court the assessment list of highway work made by the commissioners of highways of the town of *Mamaroneck*, in the county of *Westchester*, with their proceedings, and the determination of the commissioners in affixing the names of persons mentioned in the list; and the number of days which they determined each person should work for the year; among whom they named *Munro*. The certiorari recited his complaint, that manifest error had intervened in the list and proceedings of the commissioners; and the writ was allowed by the recorder of *New-York*, without any cause shown by affidavit, or otherwise.

S. S. Lush, now moved to set aside the writ as irregular. He insisted that, at common law, it could be allowed only in open court; (2 *T. R.* 89;) and the statute, (1 *R. L.* 140,) does not extend to the case.

At any rate, cause should have been shown by affidavit ; for there are certain cases in which the court, from a regard to public convenience, will refuse to allow a certiorari. (2 *Caines' Rep.* 181, 2. 20 *John.* 84. 2 *T. R.* 234.)

ALBANY,
Oct. 1826.
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Goodrich  
v.  
Colvin.

*S. M. Hopkins*, contra, said the writ issues, of course, unless restrained by the legislature. This is proved by our various statutes on the subject. And see also, *Com. Dig. Certiorari*, (B.) *Pro rege*, the writ issues, of course, even where it is forbidden by the general words of a statute.

*Curia.* Without saying whether an application should have been made to the court, we are clear that cause must be shown in all cases where a certiorari is brought to review the proceedings of an inferior jurisdiction for error. It is never of course, except where it is sued out by the people. If it were otherwise, we might have every petty judicial controversy in the state before us.

Motion granted.

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GOODRICH, administrator of GOODRICH, against COLVIN  
and LEIBER.

J. M'KOWN, for the defendants, moved to change the venue in this cause from the county of *Steuben* to the county of *Oneida*, on the ground that the action was debt on a judgment of this court ; and the venue in the original cause was laid in the county of *Oneida* ; and the record of judgment filed in the office of the clerk of this court at *Utica*, in the county of *Oneida*.

Debt on judgment is not a local action ; and the venue may be laid in any county in the state, without regard to the place of filing the record or the venue in the original cause.

He said, the action of debt on judgment is local ; and the venue is confined to the place of filing the record and original venue. (1 *Chit. Pl.* 272. 2 *Tidd's Pr.* 1035. 2 *John. Cas.* 381. 9 *John. Rep.* 259.)

ALBANY,  
Oct. 1826.

Burtch  
v.  
Hoag.

*J. L. Tillinghast, contra.* The case cited from 2 *John. Cas.* 381, was debt on a judgment of the court of common pleas. The reason of the English practice does not apply here. There, records are always filed at *Westminster*; and the object of confining the venue to that place is, that the record may be the more conveniently inspected. No such purpose is answered here, where we have three clerk's offices in three different parts of the state. The place of trial cannot follow the venue.

*Curia.* Admitting the English practice to be as stated, there is no reason why we should follow it. The main object of a venue is to facilitate the obtaining and introduction of testimony at the trial. These trials in debt on judgment, when by record, are in term time, by the record itself, without regard to the place where it may be filed. And if there be any other plea or issue than *nul tiel record*, the venue may be changed, to subserve the convenience of witnesses, as in ordinary cases. There is nothing in the nature of debt on judgment which makes it local.

Motion denied.

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BURTCH, demandant, *against* HOAG, tenant.

The supreme court are governed by the same rules in relieving against defaults in real, as in personal actions.

And default for not pleading, will, at the same term when taken, the counsel who took it being present in court, be opened of course.

AN imparlance had been granted to the first day of the present term, for the tenant to plead; which he omitted; and his default was entered.

After the *quarto die post*,

*E. Cowen* moved that the default be opened and the tenant received to plead, the counsel who took the default being in court. He said he supposed the motion for the default stood on the footing of any ordinary non-enumerated motion; which, under the like circumstances, would be opened during the term at which it was granted.

*J. L. Tillinghast, contra,* relied on the greater strictness which prevails as to real actions; and cited 2 *Dunl. Pr.* 912.

*Curia.* The strictness contended for, has been much relaxed; and, in real actions, we are now governed in granting relief against defaults by the same rules which prevail in personal actions.

ALBANY,  
Oct. 1826.

*Ex parte*  
Wright.

Motion granted.

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*Ex parte* WRIGHT.

RICHARDSON sued *Wright* in the *Oneida* common pleas for an assault and battery. Issue being joined, the parties stipulated in writing to refer the cause to three persons; that they should hear it on the pleadings; and that a judgment should be entered on their report. Afterwards, the defendant revoked the submission; but the referees, notwithstanding, proceeded to a hearing, and reported for the plaintiff. Then, the defendant having threatened to move to set aside any judgment entered on the report, the plaintiff noticed his cause for trial at the last *September* term of the *Oneida* C. P. The defendant moved to strike the cause from the calendar on the ground of the above proceedings. The C. P. made a rule denying the motion.

A general submission of a cause to arbitration is a discontinuance; but not where the parties agree that a judgment may be entered on the report. And in such a case, if the submission be revoked, the court may proceed with the cause to trial, notwithstanding the submission.

A motion was now made for a mandamus, commanding them to vacate that rule. And 18 *John. Rep.* 22, and 1 *id.* 315, were cited in support of the motion.

It was insisted that the submission to arbitration was a discontinuance of the cause in the C. P.

*T. Jenkins*, for the relator.

The motion was not opposed; but

*Per Curiam.* The court below were right. A general submission to arbitration is a discontinuance. Not so of a submission, where a judgment on the report, or a cognovit, is to follow. By the very terms of the submission, the cause is to be continued in court. The motion must be denied.

Motion denied.

ALBANY,  
Oct. 1826.

Allen  
v.  
Hendree.

*Ex parte* LAMPMAN.

LAMPMAN sued *Bennett* and others in a justice's court of the county of *Oncida*; and recovered judgment for \$40. The defendants appealed to the common pleas of that county; and a verdict was rendered for the plaintiff, on trial there, for \$3,12½. The court held that this was a case in which they might exercise a discretion as to costs, within the 41st section of the 50 dollar act, (*sess. 47, ch. 238, p. 296,*) and awarded the plaintiff \$1 costs, only.

The plaintiff in a justice's court recovered \$40; and, on appeal, his recovery was reduced to \$3, 12 1-2; *held*, that he was entitled to \$7 costs with disbursements; and that the C. P. had no discretion to reduce the costs.

That discretion exists in those cases only, where the appellee recovers less in the C. P. than in the justice's court; but still more than \$25.

It was now submitted, by consent, to this court, whether the C. P. were correct in their construction of the act.

*Allen & Collins*, for the appellee.

*A. Bennett*, contra.

*Curia.* By the proviso to the 39th section of the statute in question, in *all cases* of appeal, if either party recover a sum not exceeding 25 dollars, his costs are not to exceed 7 dollars beside disbursements.

The case is, therefore, provided for by that section; and the court below erred in not awarding the 7 dollars and disbursements.

The discretionary power of reducing the costs, is given by the 41st section, and is in cases not otherwise provided for. It can apply only to a case where the recovery in the common pleas is reduced below the recovery before the justice; but still exceeds \$25.

An affidavit for a commission must show that issue is joined in the cause; or some reason for applying before.

ALLEN and others *against* HENDREE.

J. T. B. VAN VECHTEN moved for a commission to take the examination of witnesses; but the affidavit for the motion did not state that issue was joined in the cause; nor did it assign any special circumstances, showing the



necessity or propriety of a commission, before issue in the cause.

ALBANY,  
Oct. 1826.

J. E. Lovett objected, that the affidavit was defective. It should have stated that issue was joined in the cause. (2 John. Rep. 478. 3 id. 259.)

Jackson  
v.  
Hotchkiss.

And of this opinion was the Court; and they denied the motion.

Motion denied.



JACKSON, *ex dem.* MARVIN and OTHERS, *against*  
S. HOTCHKISS.

EJECTMENT to recover part of military lot No. 44, in Homer, Cortland county, tried at the circuit in that county, January 25th, 1825, before THROOP, C. Judge; when the following facts appeared:

The defendant came into possession of the premises in question, by agreement with Daniel Hoar and Abner Hotchkiss, who took possession under a written and sealed contract to purchase of Anthony Marvin, who died in 1811; (and of whom the lessors of the plaintiff are the children and heirs at law.) This contract of purchase was dated October 19th, 1797, about which time the vendees took possession. The last payment was to have been made in March, 1799. Two payments of part of the purchase money were endorsed on the contract; the last, of \$60, as of February 14th, 1798. The present action was commenced in 1824. The vendees and the defendant had continued in possession of the premises in question from the time of the contract of purchase; and made perma-

Where one enters on land under a contract to purchase; but neglects to pay the consideration money, he and those claiming under him are estopped to question the title of the vendor, or his heirs; though more than 20 years have elapsed from the time when the last payment became due; though the vendee, and those claiming under him, have made permanent and valuable im-

provements, defended several actions of ejectment, and not been called on by the vendor to pay; and have even acquired title by conveyance from a third person.

A delay of twenty years to demand the money, or bring a suit upon a contract under seal, will raise a presumption of payment; but this may be repelled by showing that the covenantee died after the money fell due, leaving the contract in the hands of his attorney, who did not deliver it to the administrators, or place it within their control, till a number of years after the covenantor's death, it not appearing that they had any knowledge of the contract at the time of making out the inventory of their intestate's estate.

ALBANY,  
Oct. 1826.

Jackson  
v.  
Hotchkiss.

ment and valuable improvements; and the defendant had successfully defended several actions of ejectment for the same premises.

The defendant then offered in evidence a conveyance in fee of the premises in question, to himself from *Henry I. Stewart*, dated *November 6th*, 1806; a deed of the same premises from *Henry Ennis* to *Stewart*, dated *July 29th*, 1806, in which *Ennis* was described as the heir at law of *David Ennis*, a dead soldier, to whom lot 44 was patented; and also the ballot book and dead soldier list, by which it appeared that the lot was patented to *David Ennis*.

The whole of this evidence was objected to on two grounds; 1. that the defendant was concluded, having taken possession under the ancestor of the lessors; 2. that the conveyance from *Ennis* to *Stewart* was void, the lot being then in the adverse possession of the defendant.

The counsel for the plaintiff disclaimed producing the evidence offered for the purpose of setting up title against the lessors of the plaintiff or their ancestor, unless the jury should believe, under all the circumstances of the case, that the contract with the ancestor of the lessors had been rescinded.

In this view, the judge admitted the evidence; which was followed on the part of the defendant by evidence, (this also being objected to,) that the debt due to the ancestor of the lessors, on the contract of purchase, had not been inventoried by his administrators, in their inventory of his estate. This was met by the plaintiff with explanatory evidence, that the contract was, at the ancestor's death, and long before and after, in the hands of his attorney: and the judge putting the cause to the jury, upon the question of fact, whether the contract of purchase had not been abandoned, rescinded, or in some way extinguished by the parties, the jury found for the defendant.

*S. Sherwood*, for the plaintiff, now moved for a new trial, on the grounds, that the judge had admitted improper evidence; and erred in submitting the question of abandonment to the jury. He cited *Coup. 214*.

*J. A. Collier*, contra, cited 1 *John. Ch. Rep.* 354, and the cases there cited; 1 *Esp. Rep.* 366; 3 *John. Rep.* 283, 290-1; 5 *John. Ch. Rep.* 188; 3 *John. Cas.* 60; 6 *John. Ch. Rep.* 168; 1 *R. L.* 304.

ALBANY,  
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Jackson  
v.  
Hotchkiss.

*Curia, per* WOODWORTH, J. The evidence introduced at the trial, to show that the contract had been rescinded, was irrelevant and improper. The fact, that the defendant, in 1806, took a deed of the premises from *Stewart*, is no defence; the defendant being estopped from setting up a title against *Marvin*, under whom he held. It was an act done, for aught that appears, without *Marvin's* knowledge; and neither he nor his heirs can be affected by it, in an action of ejectment against the present defendant.

So also, the evidence that actions of ejectment had been commenced against the defendant, and successfully defended by him, was wholly immaterial. It is not pretended that *Marvin* ever had notice of those suits. If he had, the question of rescinding his contract had no connexion with that proceeding.

In judgment of law, there is no sufficient evidence to raise the question whether the contract was rescinded; and, consequently, it should not have been submitted to the jury.

More than twenty years had elapsed, between the time the last payment was to have been made, and the commencement of this action. Unexplained, I apprehend, the presumption of payment is made out. That presumption is, however, sufficiently repelled. *Marvin* died after the money became due. His papers relating to lot 44, appear to have been in the possession of Mr. *Sherwood*, his attorney, from 1807 to 1821. This sufficiently explains the omission of the contract in the inventory, filed by the administrators. At the time of making out the inventory, they probably had no knowledge that the contract existed. It is not urged that payment was ever made to *Sherwood*.

On the case before us, the plaintiff was entitled to recover.

ALBANY,  
Oct. 1826.

Jackson  
v.  
Hotchkiss.

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and a new trial granted,

New trial granted.

THE OCEAN INSURANCE COMPANY.

lost for a total loss on a valued policy of insur-  
the British brig *Francis*; tried at the adjourned

with a warranty against seizure for illicit trade, the defence  
in a British port, and condemned by a court of admiralty there,  
that the condemnation was not conclusive against the assured.  
Held, that the condemnation of a country, is not to be deemed a party to a sentence of confisca-  
tion of property, and, therefore, concluded by it as his own act.  
And, as a matter of a statute, or any other public authoritative act of his government; as

It seems, that a foreign sentence of condemnation is, *prima facie*, evidence that the caus-  
es of condemnation mentioned in it exist, and of the authority of the court to pronounce  
sentence; and throws it upon the party who denies the existence of the causes or the juris-  
diction of the court, to do them away by evidence on his part.  
So of the regularity of the proceedings.

Any government may lawfully provide for the seizure of vessels, or property belonging  
to its own subjects, for a breach of its municipal regulations, either on the high seas, or  
within its own territorial limits. And so of their subjects themselves.

Where a seizure and condemnation was, in terms, for breach of some or one of the Brit-  
ish laws relating to trade and navigation; held, that the party who would avail himself of  
the sentence, must not only show the proceedings of the court, but the existence of the  
law, under which the condemnation took place, by the usual evidence.

The libel and sentence are not evidence of the statute law upon which it is founded.

Proof that a ship's papers were seized with her, and delivered into the court where she  
was condemned; but that a certain paper belonging to her, could not be found there on  
search, is sufficient evidence of loss, to warrant parol evidence of its contents.  
By a statute of England, a certain amount of repairs in a foreign port takes away the  
national character of the vessel. Held, that repairs being made to less than that amount,  
did not render it necessary to sail with evidence of the true amount of repairs, as part of  
the ship's papers.

If it be the duty of the master, or supercargo, in behalf of the assured, to appear, and  
put in a claim to a vessel insured, and improperly seized under pretence of carrying on illicit  
trade, (of which *quære*.) the omission of this duty may be excused by irregularity in the  
court where the suit is pending; as where process of monition is returnable at one place,  
and the cause heard, and the vessel condemned at another, unknown to the supercargo.

The assured, in a policy upon a ship, who sustains a total loss by seizure, &c. is entitled  
to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship,  
on condemnation and sale.

In an action on a policy of insurance upon a ship, it appeared that when the underwri-  
ters were applied to for payment for a total loss, they replied that they would not settle  
the claim in any way. Held, that this was a waiver of preliminary proof of interest in  
the assured.

Answers to interrogatories upon a commission cannot be objected to, at the trial, as in-  
competent evidence, provided they are fairly within the scope of the interrogatories.

The proper time to object is, when the interrogatories are settled.

But the answers must be restrained in their effect to matters of fact; and cannot be re-  
ceived to establish a matter of law; as where a master of a vessel answered that the voy-  
age was fair and lawful, &c. This was held inadmissible, beyond showing the *bona fides*  
with which he acted.

*J. A. Collier*, contra, cited 1 *John. Ch. Rep.* 354, and the cases there cited; 1 *Esp. Rep.* 366; 3 *John. Rep.* 283, 290-1; 5 *John. Ch. Rep.* 188; 3 *John. Cas.* 60; 6 *John. Ch. Rep.* 168; 1 *R. L.* 304.

ALBANY,  
Oct. 1826.

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Jackson
v.
Hotchkiss.

Curia, per WOODWORTH, J. The evidence introduced at the trial, to show that the contract had been rescinded, was irrelevant and improper. The fact, that the defendant, in 1806, took a deed of the premises from *Stewart*, is no defence; the defendant being estopped from setting up a title against *Marvin*, under whom he held. It was an act done, for aught that appears, without *Marvin's* knowledge; and neither he nor his heirs can be affected by it, in an action of ejectment against the present defendant.

So also, the evidence that actions of ejectment had been commenced against the defendant, and successfully defended by him, was wholly immaterial. It is not pretended that *Marvin* ever had notice of those suits. If he had, the question of rescinding his contract had no connexion with that proceeding.

In judgment of law, there is no sufficient evidence to raise the question whether the contract was rescinded; and, consequently, it should not have been submitted to the jury.

More than twenty years had elapsed, between the time the last payment was to have been made, and the commencement of this action. Unexplained, I apprehend, the presumption of payment is made out. That presumption is, however, sufficiently repelled. *Marvin* died after the money became due. His papers relating to lot 44, appear to have been in the possession of Mr. *Sherwood*, his attorney, from 1807 to 1821. This sufficiently explains the omission of the contract in the inventory, filed by the administrators. At the time of making out the inventory, they probably had no knowledge that the contract existed. It is not urged that payment was ever made to *Sherwood*.

On the case before us, the plaintiff was entitled to recover.

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The verdict must be set aside ; and a new trial granted,
with costs to abide the event.

New trial granted.

FRANCIS *against* THE OCEAN INSURANCE COMPANY.

In an action on a policy of insurance, upon a British ship, **ASSUMPSIT** for a total loss on a valued policy of insurance, on the British brig *Francis* ; tried at the adjourned

by an American underwriter, with a warranty against seizure for illicit trade, the defence was, that she was seized in a British port, and condemned by a court of admiralty there, for illicit trade ; *held*, that the condemnation was not conclusive against the assured.

A citizen or subject of a country, is not to be deemed a party to a sentence of confiscation in its courts ; and, therefore, concluded by it as his own act.

And so, *it seems*, of a statute, or any other public authoritative act of his government ; as an embargo.

It seems, that a foreign sentence of condemnation is, *prima facie*, evidence that the causes of condemnation mentioned in it exist, and of the authority of the court to pronounce sentence ; and throws it upon the party who denies the existence of the causes or the jurisdiction of the court, to do them away by evidence on his part.

So of the regularity of the proceedings.

Any government may lawfully provide for the seizure of vessels, or property belonging to its own subjects, for a breach of its municipal regulations, either on the high seas, or within its own territorial limits. And so of their subjects themselves.

And so, *it seems*, of vessels belonging to foreigners.

Where a seizure and condemnation was, in terms, *for breach of some or one of the British laws relating to trade and navigation* ; *held*, that the party who would avail himself of the sentence, must not only show the proceedings of the court, but the existence of the law, under which the condemnation took place, by the usual evidence.

The libel and sentence are not evidence of the statute law upon which it is founded.

Proof that a ship's papers were seized with her, and delivered into the court where she was condemned ; but that a certain paper belonging to her, could not be found there on search, is sufficient evidence of loss, to warrant parol evidence of its contents.

By a statute of *England*, a certain amount of repairs in a foreign port takes away the national character of the vessel. *Held*, that repairs being made to less than that amount, did not render it necessary to sail with evidence of the true amount of repairs, as part of the ship's papers.

If it be the duty of the master, or supercargo, in behalf of the assured, to appear, and put in a claim to a vessel insured, and improperly seized under pretence of carrying on illicit trade, (of which *quære*,) the omission of this duty may be excused by irregularity in the court where the suit is pending ; as where process of monition is returnable at one place, and the cause heard, and the vessel condemned at another, unknown to the supercargo.

The assured, in a policy upon a ship, who sustains a total loss by seizure, &c. is entitled to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship, on condemnation and sale.

In an action on a policy of insurance upon a ship, it appeared that when the underwriters were applied to for payment for a total loss, they replied that they would not settle the claim in any way. *Held*, that this was a waiver of preliminary proof of interest in the assured.

Answers to interrogatories upon a commission cannot be objected to, at the trial, as incompetent evidence, provided they are fairly within the scope of the interrogatories.

The proper time to object is, when the interrogatories are settled.

But the answers must be restrained in their effect to matters of fact ; and cannot be received to establish a matter of law ; as where a master of a vessel answered that the voyage was fair and lawful, &c. This was held inadmissible, beyond showing the *tone fides* with which he acted.

New-York circuit, *January 10th*, 1824, before EDWARDS, C. Judge.

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The policy was dated the *15th* of *November*, 1817, and was at and from *Middletown*, in *Connecticut* to one or more islands in the *West Indies*, &c.; and contained the usual risks of the seas, &c. takings at sea, restraints, &c. of all kings, princes or people, with a clause, that in case of any loss or misfortune, it should be lawful and necessary, for the assured to work, labor and travel, for, in and about the safeguard and recovery of the vessel; to the charges whereof, the defendants would contribute, &c. warranted free from any damage or loss which might arise in consequence of a seizure or detention, *for, or on account of any illicit or prohibited trade*, &c. The policy provided for payment within 30 d ys after proof of loss.

On the trial, the plaintiff admitted that no preliminary proof of interest in the assured, had been furnished to the defendants. But he showed, that on producing the other preliminary proofs to the defendants, (*August 9th*, 1821,) they answered, that *they would not settle the claim in any way*. It appeared that the ship was owned by the plaintiff, a British subject, on whose account she was insured. She sailed on the voyage insured in *December*, 1816, under the British flag, *Robert Garrick*, a British subject, master. At the time he took charge of her, (*September 21st*, 1816,) the crew were all English, 8 in number. The ship was 147 tons, and had an English register, the last he saw of which, was in *December*, 1817. She had undergone repairs at *Middletown*; but to an amount less than 15s. for each ton. But there was no proof of this among the ship's papers. *Garrick*, the master, was examined for the plaintiff, on commission under the statute, (1 R. L. 519, 20,) and answered to the 11th and 12th interrogatories of the plaintiff, that the voyage, as far as he knew, was fair and lawful; that the vessel was regularly cleared out at *Middletown*; and he knew nothing of any illicit transactions on the voyage; and that she was not engaged in any illicit trade while he commanded her, (which was during the voyage,) with any power or pow-

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ers. About the 25th of December, 1817, *Thomas Francis*, a British subject, being then supercargo, the ship while standing off and on the port of *St. Johns*, in *Antigua*, to try the market, was seized and taken possession of, with all her papers, by his Britannic majesty's ship *Antelope*; in consequence of which, the voyage was broken up, and the ship and cargo lost to the plaintiff. The vessel being libelled in the court of vice admiralty at *Antigua*, the supercargo intended to make a defence; but being misinformed as to the time and place of hearing, the attempt failed. He went to the court house; but was told on his arrival, that the vessel had already been condemned at the judge's chambers.

The answers to the 11th and 12th interrogatories, were objected to as inadmissible; but the objection was overruled; and the defendants excepted.

Among the ship's papers was a license to the master, obtained from the British consul at *New-York*, to complete the crew by seamen not British. All the papers having been filed in the vice admiralty; and no account being given of this paper by the registrar of that court, who was examined on commission, the plaintiff, (though this was objected to,) was allowed to give parol evidence of its contents.

The libel and sentence of the vice admiralty, were proved by the defendants under a commission. By these it appeared that the ship was captured on the high seas; that she was libelled, 1. as importing goods, &c. not being a British vessel, and manned with a crew $\frac{3}{4}$ British, against the form of the British statute. 2. As importing goods prohibited by British statute. 3. As having been repaired, when this was not necessary, &c. at *Middletown*, to the amount of more than 15s. per ton, and yet importing, &c. contrary to a British statute. 4. As importing prohibited articles from the United States, contrary to a British statute. The process of monition was to appear on the 21st of *January*, between 9 and 12 A. M. at the *St. Johns* court house. It was served by being fixed on the court house door. Here, as before mentioned, the

supercargo appeared ; but the condemnation was at the judge's chambers. The decree recited that no claim had been interposed ; and condemned the vessel and cargo as forfeited, "for a breach of some or one of the laws relating to trade and navigation."

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Considerable expense was afterwards incurred by the plaintiff, in prosecuting, by his agent the supercargo, a claim before the lords commissioners of the British treasury, *London*, for the proceeds of the ship ; by whom an order was made to restore the net proceeds.

Verdict for the plaintiff, for \$8,000, subject to the opinion of the court, &c. on a case, with liberty to either party to turn it into a special verdict or bill of exceptions.

J. Duer, for the plaintiff. 1. The preliminary proof was sufficient ; the necessity of making proof of interest being waived by the conduct of the defendants. The refusal to pay was general. Had they intended to make an objection on the ground of a defect in the preliminary proof, they should have said so. (*Vos v. Robinson*, 9 *John*. 192.)

2. The defendants failed to prove that the vessel was seized and condemned on account of an illicit and prohibited trade. This was matter of defence. The warranty was not affirmative ; as that a certain course of conduct should be pursued. In such a case, I agree that compliance must be shown by the assured. It is a condition precedent. (*Condy's Marsh*. 346, 7. 7 *John*. 47. 2 *Serg. & Rawle*, 119.) In this case, however, the *onus* lies on the underwriters. What is the meaning of this clause of warranty ? I agree that the cases in *Massachusetts* would seem to give effect to a sentence founded on a mere pretence of illicit trade ; but they are in opposition to the decisions of both our own courts, and those of *England*. These require that the underwriters should show a lawful authority, in fact, to seize and condemn ; not merely a seizure and condemnation on the ground of illicit trade ; but that the trade was, in fact, prohibited ; that an offence was, in truth, committed, which formed a legal foundation

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for the forfeiture. (*Johnson v. Ludlow*, 2 *John. Cas.* 481. 1 *Caines' Cas. Err.* xxix, S. C.) So in the supreme court of the *United States*. (*Church v. Hubbard*, 2 *Cranch*, 187. *Condy's Marsh.* 346, note (55.) So in *Pennsylvania*. (*Smith v. The Del. Ins. Co.*, 3 *Serg. & Rawle*, 74, 82.) The seizure in question was made on the ground of a violation of the municipal regulations of *England*; and though, if it had been for a violation of the law of war, the court would not require proof of the authority of a public armed vessel; yet they will require it in a case which does not rest on the law of nations. They cannot take judicial notice of the local municipal regulations of foreign countries.

But, if this is to be taken as a legal condemnation as between the owner and the British nation, yet it is an event against which we did not warrant. The vessel was seized on the high seas by a public ship. No nation has power to pass a law giving such an authority. The plaintiff's vessel was without the jurisdiction of municipal law; and subject only to the law of nations. There being a defect in the jurisdiction of the court at *Antigua*, the sentence was inoperative and void. (*Rose v. Himely*, 4 *Cranch*, 241, 268.) The only evidence of condemnation on the ground of illicit trade is the record; and in no case should this be received, even as *prima facie* evidence, without proof that the court had jurisdiction. There is no pretence that the court of vice admiralty acted under the law of nations. The subject was not within its ordinary powers, and this court cannot see that it had jurisdiction. As a court of admiralty, it had no power to enforce a municipal regulation. Its power must depend on some local statute. None is shown. In *Rose v. Himely*, it was deemed necessary to show the authority of the court affirmatively, to punish infractions of the municipal law. It was conceded that it could not do this as a court of admiralty; but only in the character, of an instance court; and acting in the latter character, upon pretence of a municipal offence which did not exist, the property being seized on the high seas, the condemnation was holden void. The

record is proof of what appears on its face, not of jurisdiction. And though there be jurisdiction, if the facts set forth do not warrant a condemnation, the record cannot be received to prove a breach of the warranty. (1 *John. Rep.* 485. 2 *Cranch*, 187. 4 *id.* 241. *Fitzsimmons v. The Newport Ins. Co.*, 4 *Cranch*, 185. *Doug.* 574. *Condy's Marsh.* 397.) Where it is seen that the foreign court acts properly, nothing more is required, either to show jurisdiction, or the cause of condemnation. But what means have this court of inquiring into, and determining a question arising out of the municipal law of another nation? In every case in the courts of the *United States*, the propriety and necessity of this inquiry into jurisdiction, and the original law conferring that jurisdiction, has been admitted. (4 *Cranch*, 268. 2 *id.* 189.)

But suppose the court had jurisdiction both of the place and subject matter; still we say this sentence is void for defects apparent on the face of the proceedings.

It is void for uncertainty. It does not appear what law was violated. The cause of condemnation must be substantially shown, or the sentence is not evidence. To say the contrary, would make it conclusive; an effect which all the cases in this state deny to it. If we cannot avail ourselves of the uncertainty, there is nothing which we can deny. No time is mentioned; nor does it appear that the alleged violations had any connexion with the trade in which the vessel was engaged. In truth, no cause of condemnation appears upon the face of the sentence, except the default of the master to interpose a claim. The sentence passed by default. There was no trial. Such a cause is altogether inadequate. The master was not bound to interpose a claim. (*Gardere v. The Col. Ins. Co.*, 7 *John.* 514.) Beside, the proceedings are, on their face, fraudulent. The parties to be affected, had neither actual nor constructive notice. I admit, that where proceedings are *in rem*, as in admiralty and revenue cases, personal notice is not necessary; but the usual course is to proceed by attachment; or at least a monition must go. This is required by the law of nations. (*Vid. Hall's Adm. Pr.*

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132, 3.) It does not appear, here, that the parties had, or could have had, any notice. The notice which was given, was calculated and probably intended to mislead. It was to appear and show cause at the court house, at the very hour when the vessel was condemned at the judge's chambers.

Again ; all the causes of condemnation alluded to by the libel, are disproved. They rest on the single fact of importation, which means bringing to some port for the purposes of sale by way of commerce. The vessel had not reached the port when she was seized.

3. In addition to a total loss, the plaintiff is entitled to recover the moneys fairly expended in suing for, and obtaining a restoration of the proceeds of the vessel. (1 *John*. 412. 7 *id.* 57, 412.) We do not seek to recover what was properly chargeable on the cargo.

G. Griffin and D. B. Ogden, contra. 1. There was no sufficient preliminary proof of interest. We leave it to the court to say, whether the plaintiff has brought himself, on this point, within *Vos v. Robinson*, which he relies upon.

2. The answers of *Garrick* to the 11th and 12th interrogatories, should not have been admitted. These answers were general, and went both to the law and the fact. Perjury could not be assigned of them. Aside from these answers, there is no evidence against the fact of illicit trade.

3. Parol evidence ought not to have been admitted of the contents of the paper obtained from the British consul at *New-York*. The registrar should have been interrogated on the subject particularly ; or an authenticated copy should have been produced.


4. The assured being a British subject, cannot recover for any act done by, or under the authority of his own state. The sentence was conclusive against the whole world. Here was no want of jurisdiction in the British government, merely because the seizure was on the high seas. A nation may enforce its municipal regulations against its own subjects, either on the high seas or within its jurisdic-

tional limits. The plaintiff was a British subject ; the vessel insured was British ; both, therefore, subject to British laws ; and the vessel, sailing under a British flag, was condemned by a British court, for violating those laws. A public ship has jurisdiction every where over the subjects and vessels of its own nation, whether out at sea or in the harbor. There is no case limiting this authority, except as to other nations ; and even as to these, it may extend beyond their immediate jurisdiction. (2 *Cranch*, 234.) The court having jurisdiction, the plaintiff cannot question its proceedings. He was a British subject, and a party to those proceedings. They are to be deemed his own act. This has repeatedly been holden of the legislative acts, and public ordinances of a government. (*Conway v. Gray*, 10 *East*, 536. *Same v. Forbes*, *id.* 539. *Murray v. Shedden*, *id.* 540. *Touteng v. Hubbard*, 3 *B. & P.* 291, 302.) He is equally a party to the judicial acts of his own government. (*Menett v. Bonham*, 15 *East*, 477. *Flindt v. Scott*, *id.* 525. *Simeon v. Bazett*, 2 *M. & S.* 94. *Bazett v. Meyer*, 5 *Taunt.* 824. *Flindt v. Scott*, *id.* 674. *Power v. Whitmore*, 4 *M. & S.* 141.) A condemnation by one of the assured's own tribunals, is like the interruption of a voyage by his own act. It is a general rule that the act of a government is the act of each individual of that government ; (7 *John.* 308, 9 ;) except where both parties litigant are subjects of the government which does the act. (*id.* 318.) There, the rule, which is a political one relating to foreign governments, does not apply.

5. There is no evidence, that the vessel had not, in fact, been guilty of the infractions of the British laws relative to trade and navigation, charged in the libel. There can be no doubt that the sentence is *prima facie* evidence of the facts contained in the record. (2 *John. Cas.* 457, 467. 2 *Cain. Cas. Err.* 217.) These are negatived, we have seen, by nothing but the oath of the captain. But in this case, the sentence is more than *prima facie* evidence. It is conclusive upon the plaintiff, because he was a British subject. The decisions cited, holding these sentences

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to be only *prima facie* evidence, do not apply to a condemnation against one who is a subject of the state which condemns. They were founded on the danger of improper influence over foreign tribunals.

Again; it is not a compliance with the warranty, that the trade was not illegal: it is equally violated, if the vessel be not navigated according to law, having all necessary papers to maintain its character. (*Cleveland v. The Un. Ins. Co.*, 8 *Mass. Rep.* 308, 320. *Oswell v. Vigne*, 15 *East*, 70.) The warranty extends to the particular adventure. (*Duguet v. Rhinelander*, 1 *John. Cas.* 360. *Miller on Ins.* 496.)

The sentence is certain enough. In law, that is certain which may be made so. Take the sentence in connexion with the libel; and there is sufficient cause of condemnation apparent. How far from *Antigua* the vessel was when seized, does not appear. If she was in the limits of the port, this amounted to an importation. (*Leaper v. Smith*, *Bunb.* 79. 1 *Chit. Com. Law*, 244, 246.) But we will not insist that here was an importation in fact. It is enough that the condemnation assigns this for cause. It is conclusive upon the plaintiff, who was a party to the proceeding.

6. There was a breach of the implied warranty, that the vessel should be navigated and documented as a British vessel. Being described as a British ship in the policy, this amounts to a warranty of her character; and she was bound to sail, and be furnished as such in all respects, so as to maintain her character. (*Goix v. Low*, 1 *John. Cas.* 341. *Murray v. The U. Ins. Co.*, 2 *id.* 163. *Barcker v. The Phoenix Ins. Co.*, 8 *John.* 307. *Blagg v. The New-York Ins. Co.*, 1 *Caines' Rep.* 549.) Three fourths of the seamen should have been British. The excuse for having a less number was not properly certified. (1 *Chit. Com. Law*, 256, 7.) Nor had the vessel any papers showing her repairs to be less than 15s. on each ton. Here are two warranties; one express, the other implied; and if they be not both complied with, the underwriters are not accountable for the loss, let it happen from what cause

it would. (*Phil. on Ins.* 127, and the cases there cited. *Park*, 287.)

We have a right now to show what are the British navigation laws; and may use *Chitty's* commercial law as evidence. (3 *John.* 107.)

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[The counsel also cited different parts of *Holt's Law of Shipping*, to show that the British navigation laws had been violated by the vessel in question.]

7. No answer or claim was put in, or defence made to the libel. The master was bound to defend. All being British, and no successful defence being made, we are bound to infer that none could have been made, through some defect in the papers. Here being no immediate right to abandon, the master was the agent of the assured only. He continued so till after the condemnation. The claim might have been interposed before the monition was returnable. It is very usual in courts of admiralty to disregard the place of return, where no claim is interposed; and though the process mention one place, to condemn at another, where the judge happens to be at the time. They do this because no opposition appears. No fraud is, therefore, imputable on that ground. It is a common thing with our own courts of admiralty.

T. A. Emmet, in reply. The lords commissioners restored the proceeds of the vessel. This appears by the preliminary proof; and established the national character of the vessel and the interest of the assured, for the purpose of preliminary proof. But it is evident the defendants did not mean to question the plaintiff's interest, by the general ground which they took on the demand of payment.

As to the answers of *Capt. Garrick*; illicit trade is what every navigator is bound to know. It was right, therefore, for him to answer generally; and if gentlemen desired him to be more particular, they should have cross examined him. This is every day's practice, where the question relates to one's ordinary and daily occupations, mixed up of

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law and fact. If the answers were false, they were a fair subject of indictment for perjury.

But the objection came too late. It should have been made to the interrogatories when they were settled by the judge.

The loss of the paper received from the British consul, was sufficiently shown to warrant the parol evidence. All the papers went into the court of vice admiralty; and it was the duty of the registrar, when examined on commission, to annex it to the interrogatories, if it continued with him. Not having done so, the presumption is, that it was not to be found.

As to jurisdiction; the record speaks of the high seas as the place of seizure; and the evidence is inconsistent with the case being within the jurisdiction of a municipal court.

I yet want to see the law which says, that the sentence of a court is more conclusive on the subject of the country to which the court belongs, than a foreigner. Whatever a sentence *in rem* may be, it is the same as against all the world. Its effect is not tried by the parties. If conclusive against one, it must be so as to all. But suppose this to be its effect; upon what is the sentence before the court conclusive? The libel states four different causes of condemnation; all under the navigation laws. The sentence does not establish all or either of them. I admit, that if this had referred to the libel, it would give certainty; but it does not.

If every citizen is to be deemed a party to the acts of his own government, it does not follow that he is a party to the proceedings of all its courts. The cases cited against the plaintiff on this head, do not go beyond laws and public acts of the government itself; and, in this respect, it will be found on examining them, that they are by no means uniform; and the higher and better authority in *England*, is now against the doctrine even to this extent.

A judgment by default may carry the consequences of a condemnation; but it establishes no fact. (13 *John*. 205.) No monition was served, except by affixing on the door of

the court house. There was nothing done on board the ship to bring the notice home to the master or supercargo.

Illicit trade is municipal trade ; and it is not enough that there has been a condemnation for that cause ; but it must be shown that there was in fact an illicit trade. The law by which the trade was prohibited, must be proved as a fact before the jury. (*My argument in Smith v. Elder*, 3 *John. Rep.* 109.) A foreign law is traversable ; and must always be proved, just like any other fact.

We were not bound to carry about the ship, proof as to the amount of repairs. Originally, she was a *British* ship. *Prima facie*, she was to be deemed so in all courts, she having her register about her ; and it lay with the opposite party to justify the seizure, by proving that the amount of repairs had taken away her national character. (*Abbott*, pt. 1, ch. 2.)

There is no decision that you may not abandon immediately, on a seizure under pretence of a violation of municipal laws.


Curia, per SUTHERLAND, J. The defendants waived whatever imperfection there may have been in the preliminary proofs of the plaintiff's interest in the subject insured, by not putting their refusal to pay upon that ground. They declared, "that they would not settle the claim in any way ;" putting their objection to pay on the merits of the case, and not any defect in the proof of the plaintiff's interest. If that ground had been taken, the defect might, and undoubtedly would have been supplied. (9 *John.* 192. 7 *John.* 315. 8 *John.* 307.)

But this point was not much insisted upon by the defendant's counsel ; and is clearly incapable of being supported.

It is objected, 2. That the answers of Capt. *Garrick*, to the 11th and 12th interrogatories, ought not to have been admitted in evidence. The interrogatories do not form a part of the case ; but it must be assumed that the answers are responsive to them ; not going essentially beyond the scope of the enquiries made. If so, it appears to me the

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objection comes too late. It should have been made to the interrogatories. They are settled by a judge, or other officer possessing the powers of a judge, upon due notice, after a copy has been served upon the opposite party. If improper, they may be excepted to, and the exception will either be sustained or overruled by the judge; and the interrogatories modified or established accordingly. (1 *Dunl. Pr.* 546.) If no objection is made to the interrogatories, the information sought by them is admitted to be proper, and the answers must be considered as *competent* evidence by the admissions of the parties.

Even in oral examinations at *nisi prius*, if a party will permit questions to be put to a witness without objection, and take his chance for a favorable answer; when that answer is given, and proves adverse to his wishes, it is too late for him to object that the question ought not to have been put.

But although the answers are not to be struck out of the case as incompetent evidence, they are to be restrained in their effect to matters of fact, and not to settle questions of law. When the witness says that the voyage, as far as his knowledge went, was a fair and lawful voyage; that the vessel was regularly cleared out from *Middletown*; and he knew nothing of any illicit transactions on the voyage; and that she was not engaged in any illicit trade while he commanded her; he must be understood as speaking merely to the *bona fides* of the object of the voyage, and the conduct of the master; and not as determining or attempting to determine, whether the transactions which are proved to have taken place, did, in judgment of law, amount to an illicit trade, or an attempt to carry on an illicit or prohibited trade, or not.

It is objected, in the 3d place, that parol evidence ought not to have been admitted of the contents of the paper obtained from the British consul at *New-York*, allowing the master to complete his crew from foreign seamen, a sufficient number of British not being obtainable. This objection is unfounded. The paper is shown, by the testimony of *Charles Francis*, to have been delivered to his

brother *Thomas*, the supercargo of the vessel, (who died in 1821,) immediately before she sailed. He further testifies that the vessel sailed with it; and that it was taken possession of by the captors. The affidavit of *Sayre*, the seizing officer, shows that all the papers taken from the vessel were delivered to the court of vice admiralty at *Antigua*; and the sworn certificate of *Wm. Ramsay*, the registrar of that court, shows that he has returned certified copies of the papers and proceedings in that court. The paper in question not being among them, the presumption is, that it is not in the office at *Antigua*. This is sufficient evidence of its loss, to admit parol proof of its contents.

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These, however, are very subordinate points. Having disposed of them, we now proceed to the consideration of the important questions presented by the case. And, 1. It is contended that the assured, being a British subject, and his vessel having been condemned by a British court, cannot recover for an act done by or under the authority of his own state. There is a class of English cases, which hold this doctrine in relation to the legislative acts of a government; but no case has been furnished by the counsel, and no case has been found by the court, in which the principle has been extended to the decisions of courts of justice.

In *Touteng and another v. Hubbard*, (3 B. & P. 291,) the plaintiffs, being Swedes, and owners of a Swedish vessel, in *December*, 1800, agreed with the defendant, a British merchant, that the vessel should, with all convenient speed, sail and proceed to the island of *St. Michaels*; and there receive from the agents of the defendant a cargo of fruit in boxes, return with the same to the port of *London*, and there deliver her cargo, at a stipulated price per box. After the vessel had proceeded from *London* *Ramsgate* harbor, and before she could be got to sea, wit, on the 15th of *January*, 1801, an embargo was laid by the British government upon all Swedish vessels; by which she was detained in port until the 19th of *June* following, when the season for shipping fruit at *St. Michaels*

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was over. The defendant gave notice to the plaintiffs that they need not then proceed on the voyage, as no cargo would be furnished at *St. Michaels*. The action was to recover damages from the defendant, for not employing the vessel according to his agreement. And it was held by the court that the action could not be sustained. Lord *Alvanley*, in delivering the opinion of the court, says, the ground on which the court decide this case is, that a British merchant is not liable to answer for any damages, which the owner of a foreign vessel may sustain, from an embargo laid by the British government on foreign ships, in the nature of reprisals and partial hostility. He concedes that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only; and admits the principle of the case of *Hadley v. Clarke*, (8 T. R. 259,) that a general embargo is a circumstance against which it is equally competent for the parties to provide, as against the dangers of the seas; and if they do not provide for it, they must abide by the consequences of their contract. But he takes a distinction between an embargo imposed for general purposes, and an embargo directed against the vessels of a particular nation, in the nature of partial hostilities; and he says, this embargo not only partook of the nature of hostility, but it was in the nature of hostility by the government of *Great Britain*, of which the defendant is a subject, where the charter party was entered into, and in the courts of which the Swedish captain now seeks compensation. And he held that it would be defeating the object of the government, which was a species of reprisal on *Sweden*, to compel a British subject to indemnify a Swede against the acts of the British government, intended to resist the injustice of the Swedish court; and would be enabling a foreigner to defeat all the effects of the British embargo, and throw the burthen upon a British subject. In the conclusion of his opinion, he says all the cases admit, that where a party has been disabled from performing his contract by his own default, it is not competent for him to allege the circumstances by which he

was prevented, as an excuse for his omission ; and he asks, may not the loss which the present plaintiffs have sustained, be considered in a *political* point of view, as arising from their own default ? Must not every subject of the Swedish state be answerable for what we must consider an act of aggression on the part of his sovereign ? Here the voyage has been defeated by an act of the British state, to which all his majesty's subjects are parties, occasioned by an act of the Swedish court, to which all the subjects of *Sweden* are parties.

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In *Conway v. Gray*, and several other cases substantially like it, (10 *East*, 536 to 549,) the question came before the court of king's bench, how far the citizens of a country are to be considered as participating in, and assenting to the acts of their government, where those acts are brought to bear upon individual contracts. They were cases arising under our embargo law of the 22d of *December*, 1807. *Conway* and *Davidson*, the plaintiffs, in the principal case, were the consignees of *J. Townsend*, a merchant in *New-York*, who, on the 23d of *December*, 1807, shipped on board a vessel a quantity of wheat and peas, consigned to *Conway* and *Davidson*, at *Liverpool*. The embargo was first known in *New-York*, on the 25th of *December*, before the vessel sailed, by which the voyage was, of course, broken up. The plaintiffs having been advised by *Townsend* of the intended shipment, on the 25th of *January*, 1808, effected an insurance upon it, with the defendant ; and charged the premium to the account of *Townsend*. As soon as the plaintiffs heard of the detention, they abandoned to the underwriters ; and brought their action ; and the principal question was, whether the American embargo would warrant an abandonment by, or on behalf of an American subject, against an English underwriter. The court of king's bench held, that the plaintiffs could not recover ; and Lord *Ellenborough*, in delivering the opinion of the court, remarks, that "in all questions arising between the subjects of different states, each is a party to the public authoritative acts of its own government ; and on that account, a foreign subject is as

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much incapacitated from making the consequences of an act of his own state, the foundation of a claim to indemnity upon a British subject, in a British court of justice, as he would be, if such act had been done immediately and individually by such foreign subject himself. In these cases," he continues, "the foundation of the abandonment is an act of the American government. Every American subject is to be considered as a party to that act. It has virtually the concurrence and consent of all; amongst the rest, the concurrence and consent of the assured in these cases. They have, therefore, joined in a resolution, that the ship in question shall not be allowed to sail; but shall remain in their port; and is it possible for them afterwards, to make their not sailing, the foundation of an action? The party who, himself, prevents the act from being done, has no right to call upon the underwriters to indemnify him against the loss he may sustain from such act not being done."

This doctrine was reiterated in a series of cases which arose in 1812, under the system then pursued by the British government, of granting licenses to trade with the continental powers, with most of whom they were at war.


In *Mennett and another v. Bonham*, (15 East, 477,) and *Flindt v. Scott*, (15 East, 525,) the licenses were granted to British merchants, on behalf of *themselves and others*. The real parties for whose benefit they were obtained, were Russian subjects, and alien enemies residing in Russia. The goods were insured in *England*. They were seized and condemned in a Russian port, by the Russian government; and it was held that *the Russian assured*, notwithstanding the license, could not recover from a *British* underwriter, a loss occasioned by the act of his own government; on the ground that, in judgment of law, he was a party to that act. The latter case of *Flindt v. Scott*, was subsequently reversed in the exchequer chamber; (5 Taunt. 674;) and though the doctrine which we are now considering was not formally overturned, it was spoken of by the only baron who delivered an opinion, (baron Thomson,) in terms, which show that he did

not consider it as settled ; and that it by no means received his approbation. He says, "the second objection made to the plaintiff's recovering in this case, was, that the underwriters were not answerable for this loss, because it was occasioned by the act of the *Russian* government, to which the persons interested must be supposed to have given their assent, being *Russians* ; and in support of that position," he continues, "two cases were cited, *Touteng v. Hubbard*, and *Conway v. Gray*." And after stating the circumstances of the first case, and that the question which it presented was, whether the *Swedish* owner acquired a right by proceeding on the voyage after the embargo was taken off, to recover the freight against a *British* merchant, he says, "the court determined that he had no such right ; and they went farther ; and determined, what was not then a question before them, that an insurance, upon the property of a foreigner, against a loss remotely occasioned by an act of his own state, would be illegal. It was not the main question in that case, though certainly it was so decided. The case of *Conway v. Gray*, proceeded, in a degree, on the authority of *Touteng v. Hubbard*. But these decisions," he remarks, "even supposing them to be correct, as applied to the cases in which they were made, do not affect the present case." No doubt can be entertained from these expressions, that the ch. baron meant to be understood as questioning the correctness of those decisions ; and that if they had stood in the way of a reversal of the judgment then under consideration, they would have been overturned. He adverts with approbation, to the more liberal doctrine held by lord *Ellenborough* in *Usparicha v. Noble*, (13 *East*, 332.)

Lord *Ellenborough*, himself, in the more recent case of *Simeon v. Bazett*, (2 *M. & S.* 94,) seems to have been anxious to get around, without directly subverting his previous decisions upon this point. That was the case of an insurance effected in *London*, upon the ship *Sophia*, at and from *London* to any port or ports in the *Baltic* or gulph of *Finland*, &c. The insurance was made

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by the order, and on the account and risk of certain *Prussian subjects*, resident at *Colberg*, in *Prussia*, who were avowed to be the parties in interest. The ship sailed from *London* to *Colberg*, carrying simulated papers, as was the custom of the trade; and bearing the Swedish flag. The ship and cargo having arrived near *Colberg*, were seized by certain persons exercising the powers of government in *Prussia*, and were finally confiscated by order of the Prussian government. *Prussia* had, at that time, acceded to the continental system of the emperor of *France*; but was at peace with *England*. One would think that no case could well have been presented, which would call more loudly upon a British court, for the application of the doctrine, that every citizen or subject must be considered a party to the authoritative acts of his government; and that the Prussian assured, residing in the very place where the seizure and confiscation were made, would not have been permitted to *make his own wrongful act*, if the act of his government be his, the foundation of a claim against a *British underwriter* in a *British court*. But lord *Ellenborough* held that he was entitled to recover, on the ground that, from the well known course of the *Baltic* trade, (all direct intercourse between those ports and *Great Britain* being prohibited,) the peril in question must have been within the contemplation and meaning of the parties. And he thus qualifies the doctrine of the previous cases: "The exclusion of risk occasioned by the act of the assured's own government, is only an implied exclusion from the reason and fitness of the thing; which, however, may be rebutted by circumstances. As the perils occasioned by the act of the party's own government, are held to be excluded on the reason of the thing; so they may be held to be included whenever the reason of the thing requires it." If I understand this gloss, it is neither more nor less than that there is no settled rule of law upon this subject; but that each case must be decided according to the view which the court may take of its intrinsic equities. In determining the equity of such a law, I presume his lordship would

have given no weight to the circumstance, that the assured, when the act of his government which is complained of took place, was in another hemisphere ; or if at home, that he solemnly protested against it. This case also came before the exchequer chamber, upon a writ of error, (5 *Taunt.* 824.) The judgment was affirmed on the broad ground, that it was no objection to the plaintiff's recovery, that the loss happened by the act of the country of the assured. And chief baron *Thomson*, who again delivered the opinion of the court, pointedly disclaims being governed by the distinctions taken by lord *Ellenborough* ; and explodes the whole doctrine in this emphatic manner : " This was precisely one of the points disposed of in the case of *Flindt v. Scott* ; that the loss was by the act of the country of the assured. I very imperfectly expressed myself in that judgment, if I did not express that which the whole court certainly decided, unless I misunderstood them, *that it was no objection to the plaintiff's recovery, that the loss happened by the act of the country of the assured.* It was argued on, and the court certainly took it into their consideration, and we cannot hear it argued again now. It may have happened, that the court of king's bench have given judgment below for the plaintiff in this action, on a different ground ; but the facts support the judgment upon our reasons."

The contract of insurance is peculiarly one of equity and good faith ; and I should regret to see it subjected to so technical and fanciful a rule of construction as that which we have been considering. All the cases admit, that detention by an embargo, or other act of any other government than that of the assured, is one of the perils covered by the ordinary policy, and is good ground of abandonment. That an embargo by the government of the assured is as much within the actual contemplation of the parties, as an embargo by any other government, cannot be questioned ; nor that the citizens of a country have no actual participation in the acts of the government, in any sense which would make it a violation of good faith to permit them to make those acts the foundation of a claim

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against a foreign underwriter. It strikes me as unworthy of the advanced intelligence of the age, and of the enlightened condition of its jurisprudence, to suffer the symmetry of so important a department of the commercial law, to be broken in upon, on the strength of a notion so purely theoretical. This is the first time, I believe, in which this question has come before an American court ; and I have, for that reason, dwelt upon it longer than was necessary, for the purposes of the case which we are now deciding.

But, admitting the doctrine of lord *Ellenborough* to be sound, I am not aware that it has ever before been contended, even in argument, that every citizen of a country is a party to all the judgments pronounced by its courts. The principle has never been attempted to be extended to any other than legislative acts, or acts of state ; such as embargoes or confiscation founded upon state ordinances.

The assured, therefore, is not so far a party to the proceedings of the court at *Antigua*, as to preclude him from making those proceedings, if unauthorized and illegal, the foundation of a recovery against the defendant.

I do not deem it material to determine, whether it is incumbent on the plaintiff, in the first instance, to impeach the judgment and proceedings of the court at *Antigua* ; or whether the burthen of sustaining them is imposed upon the defendants. The evidence on both sides is before the court. I apprehend, however, that the sentence of condemnation, with the accompanying proceedings, so far as they disclose the causes of condemnation, are *prima facie* evidence of the existence of those causes, as well as of the authority of the court to pronounce the sentence ; and impose the *onus* of impeaching, either the jurisdiction of the court, or the regularity of its proceedings, or the existence of the facts upon the assumption of which the decree has been pronounced upon the opposite party.

In *Church v. Hubbart*, (2 *Cranch*, 187,) the policy contained a condition similar to the one in this case, that the insurers were not to be liable for seizure by the Portuguese for *illicit trade*. The vessel was seized and condemned by the governor of *Para*, professing to exercise the pow-

ers of a court of admiralty, for an attempt to carry on an illicit trade with that port ; that is, for a violation of its municipal laws. The defendant there produced the decree, as evidence that the condemnation was for the cause excepted from the policy. The objection was, that the decree was not properly authenticated ; and that objection was sustained by the court. But it was not denied that the decree, if properly proved, would have been evidence of the grounds of condemnation, so far as they appeared on the face of the decree. The sentences of foreign admiralty courts have always been received in our courts as *prima facie* evidence against the assured. (2 *John. Cas.* 287, 481-5)

But the condemnation, in this case, is impeached by the plaintiff, on several grounds : and

1. It is contended that it appears from the libel, that the seizure was made *upon the high seas* ; not as prize of war ; but for a violation of the municipal laws of *Great Britain* ; and that the right to seize for a violation of those laws, is confined to the territorial dominions of the government making it. This opinion was expressed by Ch. J. *Marshall* ; and, as he supposed, it was concurred in by a majority of the court, in *Rose v. Himely*, (4 *Cranch*, 279.) But the contrary doctrine was finally established by the supreme court of the *U. States*, in *Hudson v. Guestier*, (6 *Cranch*, 283.) The seizure was there made for a violation of a municipal regulation in relation to the island of *St. Domingo*, at the distance of six leagues from the island ; and confessedly, of course, beyond its territorial limits or jurisdiction. The only question in the case was, whether the seizure was warranted by the law of nations ; and the whole court, (with the exception of the Ch. J.) held that it was, and overruled the case of *Rose v. Himely*, so far as it conflicted with that opinion. The same doctrine had been previously advanced by that court, in *Church v. Hubbard*, (2 *Cranch*, 234, 5, 6,) where the seizure was made five leagues from land. These authorities dispose of this objection.

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But admitting the general rule to be as contended by the counsel for the plaintiff; that a seizure either of persons or property, for a breach of a municipal regulation, cannot be made beyond the territorial limits of the government making it; it applies only to persons, not citizens or subjects, and property not belonging to citizens or subjects of that government. That it is competent for the sovereign authority of a country to authorize the seizure of its citizens, or of their property, for a violation of its laws, wherever they can be found, provided the jurisdiction of other nations is not interfered with, is a proposition too clear to require support or illustration. The high seas are the common property of all nations, where each has concurrent, and none exclusive jurisdiction. The sovereign authority of any country, therefore, may arrest its own subjects, or seize their property upon the high seas, without infringing the jurisdiction, or interfering with the rights of any other country. The seizure in this case was of a British vessel, sailing under a British flag, belonging to a British subject, for a violation of British municipal regulations or navigation laws.

Upon either of these grounds, this objection cannot be sustained.

But it is contended, secondly, that admitting the legality of the seizure, there is no sufficient evidence that the vessel had been engaged in an *illicit trade*; that the court, in making the condemnation, did not act in the capacity of a court of admiralty under the law of nations; nor was the condemnation for any violation of that law; but for a breach of the statute law of *Great Britain*; "of some or one of the laws relating to trade and navigation," as it is expressed in the decree of the court. That it was incumbent on the defendant, therefore, in order to sustain the decree, to prove the existence of a law condemning the trade. This objection, as far as it goes, appears to me unanswerable. The warranty in the policy, against any "damage, charge or loss which may arise in consequence of a seizure or detention for, or on account of any illicit or prohibited trade," extends only to that risk to which

such trade is by law exposed. To constitute a breach of such warranty, *the seizure must be for an actual, illicit and prohibited trade.* A seizure and condemnation under pretext of such trade, is not sufficient, if the trade is not *in fact illicit.* Both a seizure and illicit trade must concur; and the illicit character of the trade is not proved merely by the fact of the seizure. (*Johnson v. Ludlow*, 1 *Caines' Cas. Err.* xix. *Graham v. The Penns. Ins. Co.*, 1 *Marsh.* 347, *note.*)

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In *Smith v. The Del. Ins. Co.*, (3 *Serg. & Rawle*, 74,) the action was upon a policy containing a warranty or exception similar to this. The vessel was seized and condemned, for a cause, as it was contended by the defendants, within the warranty or exception. Ch. J. *Tilghman*, (p. 82,) remarks, "to bring the case within the warranty, there must be both a seizure and an illicit or prohibited trade. It is not enough that a seizure is made on an allegation of prohibited trade. *It must be proved that there was a prohibition, and that the case is within it.* So in *Church v. Hubbard*, (2 *Cranch*, 236,) Ch. J. *Marshall*, in speaking of this warranty, says, "that the exclusion from the insurance, of the risk of illicit trade, is an exclusion only of that risk to which such trade is *by law exposed*, will be readily conceded. It is unquestionably limited and restrained by the terms *illicit trade*. No seizure not justifiable under the laws and regulations established by the crown of *Portugal*, for the restriction of foreign commerce, with its dependencies, can come within this part of the contract. And every seizure which is justifiable by those laws and regulations, must be deemed within it."

In *Smith v. The Del. Ins. Co.*, the condemnation was alleged to have been for a breach of the 3d and 4th articles of a decree of the emperor *Napoleon*, of the 6th of *August*, 1807. Those articles were accordingly read upon the trial, on the part of the defendants. Whether they were read by consent, without proof, or how they were proved, does not appear; nor is it material. The material fact is, that it was deemed necessary to produce upon the trial, the law under which the condemnation was made; that the

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court might judge whether it authorized the condemnation or not; and they held that it did not. In the case of *Church v. Hubbard*, the same course was pursued. The case states, "that the defendant, to prove that the trade was illicit, offered a copy of a law of Portugal, entitled, &c.; and to prove that the vessel was seized for illicit trade, the defendant produced a paper purporting to be a copy of the sentence of the governor of Para, on the brig *Aurora*." Ch. J. Marshall thus states this part of that case: "To prove that the *Aurora* and her cargo were sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendant in the circuit court." And the judgment in that case was reversed solely on the ground, that those edicts and that judgment were not properly proved.

These cases seem fully to establish, 1. That to show any particular trade to be illicit, under municipal regulation, the law by which it is prohibited must be produced and proved; and 2. That it is the business of the defendant to sustain the sentence by proving the law.

In the case at bar, there was no attempt to prove any law of Great Britain prohibiting the trade in which the ship *Francis* was engaged when seized at *Antigua*. So far, therefore, as the sentence of condemnation proceeds on the ground of illicit trade, it must be deemed to have been unauthorized and illegal.

The decree itself does not specify the grounds on which the condemnation is pronounced. It merely alleges, that "it is for a breach of some, or one of the laws of navigation."

The libel states four grounds on which the seizure was made: 1. For importing goods, &c. on board the vessel, she not being wholly owned by a subject of Great Britain, and navigated by a British master and  $\frac{3}{4}$  British mariners. 2. For importing into *Antigua* certain prohibited goods, &c. of the growth, production and manufacture of Europe, &c. 3. That the ship had undergone repairs in the U. S. not necessary, by reason of extraordinary damage, &c.

exceeding 15s. for every ton; whereby she became an alien vessel; and being such alien vessel, imported the goods, &c. being prohibited, &c. 4. That certain enumerated articles particularly named, were imported in the vessel by way of merchandizes, from one of the ports of the U. S. of America, against the form of the statute, &c.

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Upon which of these causes the condemnation proceeded, it is impossible to determine. If but one cause had been alleged in the libel, the decree might be supposed to have intended to adopt and verify that. The causes assigned are however, not only various, but inconsistent. The remark is alike applicable to them all, that they make the cause of seizure a violation of some British statute; and the fact of condemnation is the only evidence, not only of the breach, but of the existence of such statutes. Ch. Justice Marshall in *Church v. Hubbard*, (2 Cranch, 236,) in discussing this subject, remarks, that foreign laws are well understood to be facts, which must, like other facts, be proved to exist, before they can be received in a court of justice. The principle, that the best testimony shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign laws, as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority, that the law respects it not less than the oath of an individual. In *Robinson v. Clifford*, (2 Marsh. 706 a. note,) it is said, "The statute or written law of foreign countries, should be proved by the law itself. The unwritten law may be proved by witnesses." (*Seton v. The Del. Ins. Co.*, 2 Marsh. 706 a. note. 2 Caines' Rep. 155, 163. *Delafeld v. Hand*, 3 John. 310. 2 Marsh. 713. *Smith v. Elder*, 3 John. 105. 1 P. Wms. 431. *Peak. N. P. Cas.* 18. 3 Esp. Rep. 58. 4 id. 79.) This evidence is addressed to the jury; and should be given upon the trial, and not at bar.

But it is said that the description of the vessel in the policy, as the British brig, &c. is an implied warranty that

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she was a British vessel, and should carry with her the documents necessary to establish that character; and that if the warranty is false, the plaintiff cannot recover, whether that was the cause of condemnation or not.

Admitting that a description which, in time of war, will amount to a warranty of the *national* character of a vessel, will in time of peace amount to a warranty of her commercial character, (which may admit of very serious discussion,) it is a sufficient answer, that the evidence in the case, clearly establishes a compliance with this implied warranty. The testimony of *Charles Francis* shows that the vessel, at the time of her sailing, had on board a certificate or document from the British consul at *New-York*, dispensing with the usual proportion of British seamen. This document undoubtedly went into the possession of the captors, with the register and other papers belonging to the ship; and removes all objection to the character of the vessel, growing out of her deficiency in British seamen.

The evidence in the case also shows that the repairs put upon the hull of the vessel at *Middletown*, cost less than 15*s.* for each ton.

It cannot be necessary for the master of a vessel to carry with him the evidence of the amount expended upon his vessel. If the fact be, that the repairs cost less than 15*s.* per ton, he has a right to rely upon the knowledge of that fact, and to presume her national character will not be impeached, without some evidence that she has violated the navigation laws in that respect.

Admitting it to have been the duty of the supercargo to have appeared and interposed a claim to the vessel, his omission to do it is sufficiently accounted for. It is shown to have been owing to the irregular proceedings of the court, and not to any culpable omission on his part. He attended at the time and place appointed for trial; and was informed that the vessel had already been condemned at the judge's chambers. (7 *John.* 426, 514.)

I am, therefore, of opinion that the plaintiff is entitled to recover as for a total loss. The cases of *Watson v. The Mar. Ins. Co.*, (7 *John.* 57,) *Maggrath v. Church*,



(1 *Caines*, 215,) *Jumel v. Mar. Ins. Co.*, (7 *John*. 425,) and *M<sup>r</sup> Bride v. Mar. Ins. Co.*, (5 *John*. 298,) seem to show that he is also entitled to recover all the expenses fairly incurred in obtaining a restoration of the proceeds of the vessel, unless the freight and cargo also belonged to him; in which case those expenses would be the subject of general average in the first instance. (7 *John*. 425.)

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Judgment for the plaintiff.

#### BURT against PLACE.

ASSUMPSIT for land sold, money had and received, &c.; tried at the *Oneida* circuit, in *March*, 1826, before WIL-  
LIAMS, C Judge; when a verdict was taken for the plain-  
tiff, for \$296,30, subject to the opinion of this court.

At the trial, it appeared that the plaintiff had, in *April*, 1822, conveyed a small parcel of land to the defendant, by deed acknowledging the receipt of \$300 consideration money. But \$10 were, however, in fact, paid. The defendant agreed to pay the residue in specific articles, excepting \$50, which he was to retain for assisting the plaintiff in defending a law-suit, pending before a justice. The defendant afterwards sold the land to one *Addington*, by deed, acknowledging the receipt of \$250, as the consideration. He assisted the plaintiff in defending the suit; but was not licensed as attorney or counsel.

Several objections to the plaintiff's recovery were taken at the trial; but the only one passed upon by this court, was, that the transaction was illegal; that the plaintiff's claim for either the value of the land, or the money which the defendant had received for it, was founded on an illegal agreement between the parties; a part of the consideration being for maintenance. That this vitiated the whole transaction; and the parties being *in pari delicto*, the plaintiff could not recover.

An agree-  
ment to aid in  
defending a  
suit, with one  
who is not li-  
censed as at-  
torney or  
counsel, is il-  
legal and void  
for mainte-  
nance.

And where  
B. sold and  
conveyed land  
to P., who was  
not of the le-  
gal profession,  
upon an agree-  
ment that the  
latter should  
pay part in  
specific arti-  
cles, and part  
in defending  
a law suit be-  
fore a justice;  
*held*, that the  
whole agree-  
ment was ille-  
gal and void;  
and though  
the latter had  
sold the land,  
and received  
the money for  
it, the former  
could recover  
nothing.

Where mo-  
ney, &c. is

received upon, or in consequence of, an illegal contract, both parties being *in pari delicto*, it cannot be recovered back.

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*Edw. Allen*, for the plaintiff, cited *Bac. Abr. Maintenance*, (A.) 3 *Cowen*, 649; 20 *John*. 403; 5 *John*. 489, 500; 10 *John*. 185.

*S. Beardsley*, contra, cited 2 *Chit. Cr. Law*, 234, note (a); 4 *Bl. Com.* 134, 5; *id.* 125; *Co. Lit.* 368. b.; 5 *John*. 334; 3 *T. R.* 23, 456; *Cowp.* 200; and several other cases, going to illustrate the distinctions laid down in *Cowp.* 200, by *Ld. Mansfield*.

*Curia, per SAVAGE*, Ch. Justice. Maintenance being prohibited by statute, (1 *R. L.* 173, 174,) and a part of the consideration being therefore illegal; this was sufficient to vitiate the contract. (1 *Leon.* 179, 180. *Dy.* 355. b.)

The main question then is, can money paid or received upon an illegal contract be recovered back?

The general rule of law is, that it cannot, when it is paid upon an illegal consideration, and both parties are equally criminal. This was so laid down by lord *Mansfield*, in *Smith v. Bromley*, (*Doug.* 696, note.) His language is, "if the act is, of itself, immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*." In *Lowry v. Bourdieu*, (*Doug.* 467,) he said, he desired it might be understood, that the court held, that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back; except in cases of oppression, where the parties are not in *pari delicto*. In *Howson v. Hancock*, (8 *T. R.* 575,) lord *Kenyon* says, "there is no case to be found, where, when money has been actually paid by one of two parties to the other, upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back." This doctrine has been since repeatedly recognized; and I know of no case containing a contrary doctrine. In *Lowry v. Bourdieu*, *Buller*, justice, says, "there is a sound distinction between contracts executed and executory; and if an action be brought with a view

to rescind a contract, you must do it while the contract continues executory ; and then it can only be done on the terms of restoring the other party to his original situation."

In *Hunt v. Knickerbacker*, (5 John. 334,) Thompson, J. says, "it is a general rule of law, that all contracts or agreements which have for their object any thing which is repugnant to the general policy of the common law, or contrary to the provisions of any statute, are void, and not to be enforced." In *Mount v. Waite*, (7 John. 440,) the plaintiffs were allowed to recover back a premium paid upon the insurance of lottery tickets ; but *Kent*, Ch. J. who delivered the opinion of the court, puts it expressly on the ground that they committed no crime in making the contract. They violated no statute, nor was the contract *malum in se*. Not so in this case. The contract was both *malum in se*, and prohibited by statute ; and, although it is against conscience for the defendant to keep the plaintiff's money, the court will not lend its aid to enable the latter to recover back money thus illegally paid.

It is unnecessary, therefore, to decide, whether the acknowledgment by the defendant in the deed to *Addington*, of having received the consideration of him, is evidence of the payment of the money to him. (a)

The defendant is entitled to judgment.

Judgment for the defendant.

(a) *Semb.* that it is. (*Thalhimer v. Brinckerhoff*, ante, 90.)

THE OVERSEERS OF THE POOR OF THE TOWN OF BERN  
against THE OVERSEERS OF THE POOR OF THE TOWN  
OF KNOX.

ON certiorari from the general sessions of the peace of the county of *Albany*.

that of the father, if he appear to have any. If not, it follows that of the mother. The place of a child's birth is, *prima facie*, the place of its settlement ; but the presumption is done away by proof that its mother had a settlement elsewhere.

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Oct. 1836.

Bern  
v.  
Knox.

The settlement of the child follows

ALBANY,  
Oct. 1836.

Bern  
v.  
Knox.

Two justices made an order removing *Hannah Cotton*, a pauper, from the town of *Bern*, *Albany* county, to the town of *Knox*, in the same county; and on appeal by *Knox*, to the general sessions of *Albany* county, that court quashed the order; on which the overseers of *Bern* brought the present certiorari.

On the hearing before the sessions, the overseers of *Knox*, (the appellants) proved that *Ephraim Palmer*, the pauper's maternal grand-father, was in possession of a valuable farm of about 100 acres in the town of *Washington*, *Dutchess* county, about forty-nine years before the hearing. He was reputed to be the owner, and devised the land, which was worth, in his life time, \$25 per acre. He died about the close of the revolutionary war: had a daughter *Joannah*, the mother of the pauper, who married *John Cotton*, who, with *Joannah* his wife, after her father's death, removed to, and resided in *Pittstown*, *Rensselaer* county, about a year; and thence to *Bern*, in *Albany* county. They lived on a farm there, where the pauper, their daughter, was born, in that part of the town which is now *Knox*.

*P. S. Parker*, for the plaintiffs in error.

*J. L. Wendell*, contra.

*Curia, per Woodworth, J.* It appears that the mother of the pauper had a settlement in *Dutchess* county, in right of her father; consequently the pauper had a settlement there in right of her mother.

It is not shown that the pauper's father had any settlement. The rule is, that the settlement of the child follows that of the father, if he has any; if not, the settlement of the mother. (*Burr. Sett. Cas.* 482, *No.* 153. 2 *Cowen*, 537.)

It is stated in the case, that *Cotton*, the father, lived on a farm in that part of the town of *Bern* now *Knox*; and that the pauper was born there. These facts are of no avail; for, although the place of birth is, *prima facie*, the place of settlement, it is only so, when the settlement of

the parents is not ascertained. Here the settlement of the pauper's mother is established. It not appearing that the father had any settlement, the pauper's settlement follows that of the mother. If, indeed, the town of *Knox* had failed in proving a settlement gained by either parent, the charge would have been thrown on that town, by reason of the birth.

I am of opinion that the order of the sessions be affirmed.

Order of sessions affirmed.

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THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK  
OF CAPE FEAR *against* GOMEZ, impleaded with others.

ASSUMPSIT, on a promissory note, dated *Wilmn. N. C.* Decr. 1819, by which one *B.* as principal, and the defendant and others as securities, promised to pay to the order of the plaintiffs, on or before the 1st day of *January*, 1821, \$5000, value received, payable and negotiable at the bank of the plaintiffs, with interest from the 1st day of *January*, 1820. This note was signed thus: "*A. L. Gomez*," (the defendant,) "by *Lewis Gomez*, atty." after the other makers in their own hand.

*Gomez*, the defendant, alone was arrested, and appeared in this suit.

Plea, non assumpsit.

The cause was tried at the *New-York* circuit, *July 1st*, 1824, before *EDWARDS*, C. Judge.

At the trial, the plaintiffs proved a power of attorney, dated *February 22d*, 1820, signed and sealed by the defendant, authorizing his brother, *L. Gomez*, "to sign a note for five thousand dollars, (\$5000,) payable to The president, directors and company of the bank of Cape Fear, of which *J. F. B., &c.* (naming the makers not arrested,) are joint makers or drawers; also another note for five thousand five hundred dollars, (\$5,500,) payable as above, and of which, *J. F. B., &c.* (other persons,) are joint makers,

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Oct. 1828.

Bank of Cape  
Fear  
v.  
Gomez.

A power of attorney to add one's name, as surety, to a pre-existing note, describing the note correctly as to the parties, the sum, and the time when payable, tho' it omit to mention that the note bears interest before due, is sufficient to sustain a verdict upon it against the one whose name was put there under the power. The question whether the particular note was intended, is one of identity; and may properly be submitted for determination, to the jury.

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Oct. 1826.  
~~~~~  
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v.
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both of said notes payable on the 1st day of *January*, 1821 ;" and that the defendant's name was subscribed to the note, sometime between the 22d of *February*, 1820, and the 8th of *March*, of the same year.

The plaintiffs then admitting a payment of \$2000, rested their cause.

The defendant moved for a nonsuit, because the note was signed by the attorney of the defendant ; whereas the power produced did not authorize such signature ; that the power was simply to sign a note for \$5000, &c. without saying that it bore interest before due ; whereas the note signed bore interest from the 1st day of *January*, 1820. The note in question, was, therefore, not the one intended by the power.

The judge overruled the motion, and left it to the jury to say whether the note in evidence was the one intended by the power. The defendant excepted. The jury found for the plaintiffs.

In behalf of the defendant, a motion was now made for a new trial ; on the ground that the power did not warrant the signature ; and that the question submitted to the jury was improper for them.

J. Oakley, jun. for the defendant. The attorney acted under a special and limited power ; (*Paley on Ag. 2* ;) and could not bind his principal by any act beyond the scope of his authority. (*Fenn v. Harrison*, 3 *T. R.* 757. 4 *id.* 177, *S. C.*) In pursuance of this principle, it has been decided, that a power to act for one *as executrix*, will not authorize the acceptance of bills to charge her in her own right, though for debts due from her testator. (*Gardner v. Baille*, 6 *T. R.* 591.) An authority to sign a note payable at 6 months, will not extend to a note for 60 days. (*Batty v. Carswell*, 2 *John.* 48.) The same principle has been repeatedly recognized by this court. (7 *John.* 394. 15 *id.* 54.) And where an agent exceeds his power in any one particular, his acts are wholly void. They shall not bind the principal *pro tanto*. (*Roe v. Prideaux*, 10 *East*, 158. *Jackson v. Huntley*, 5 *John.* 59, *per Cur. S. P.*)

This strictness of construction is, especially, applicable in favor of sureties. A bond that a clerk shall serve faithfully, and account for all money, &c. to the obligee and his *executors*, does not extend to money received by the clerk while in the employment of the executors, who continued the very business of their testator. (*Barker v. Parker*, 1 T. R. 287.) A promise to a house in trade, consisting of three, to pay for goods to be furnished to another, is confined to the very promisees; and cannot be enforced for goods furnished after one has withdrawn from the firm. (*Myers v. Edge*, 7 T. R. 250.) Nor will a promise to pay one for goods, bind the promisor to pay him for goods furnished by another on the promisee's request, and on his responsibility. (*Walsh v. Bailie*, 10 John. 180.)

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The jury had nothing to do with the question. The objection raised related to the execution of a special power; and involved a point of law merely.

D. B. Ogden and *J. O. Hoffman*, contra. We do not deny the general principle of law, that a special power must be strictly followed. But we do deny that either the general principle, or the authorities by which the counsel for the defendant has illustrated it, are applicable to the case before the court. This is not a power to execute a new note; but to sign one already in existence; and the only question which could arise was, whether the note in question was the one intended by the power. In other words, it was a mere question of identity; of correspondence in certain points of fact, or description; and being so, the judge had nothing to do with it, except to submit it, as he did, to the jury. The defendant took on himself a knowledge of all the circumstances in relation to the note. There was no other note in existence which corresponded in any one particular; nor was this pretended.

T. J. Oakley, in reply. There was nothing in evidence beside the power and the note. Their existence was not questioned; and there was, therefore, not a single fact to
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be passed upon by the jury. The whole was a question of construction upon two written instruments. True, in all cases of the execution of a power, the question is, in a measure, one of identity, between the act intended and the act done; but it ceases to be a question for the jury, when every fact is conceded. The intent must be drawn from the written power. This is purely a question of law. There was a plain variance, and a substantial one, between the note and the power; and if a court of law are satisfied that the note in question was intended, they can give no relief. Such a mistake cannot be rectified short of a court of chancery.

Curia, per SUTHERLAND, J. The judge properly refused to nonsuit the plaintiffs. It is apparent, on the face of the power of attorney from the defendant to his brother *Lewis*, that he intended to authorize him to sign his name to a pre-existing note. It is, "to sign a note for 5000 dollars, payable to the president, directors and company of the bank of Cape Fear, of which *J. T. B.* and others are joint makers or drawers, payable on the 1st day of *January*, 1821." The note is not *to be made* payable; but it *is* payable. *J. T. B.* and others are not *to be* joint makers, or drawers; but they *are* joint makers, or drawers. The note is not *to be* made payable on the 1st of *January*, 1821; but it *is* payable on that day. This is evidently intended as a general description or designation of a note, which the defendant knew to have been drawn; and to require only the signature of his name to render it perfect. He must, therefore, have been presumed to know the contents of the note; and to have described its several characteristics by way of designation only. The description is accurate, as far as it goes. It seems to me, then, to have been a question of identity merely, as to the note intended; and that was a question of fact exclusively for the jury. Whether the power of attorney would have authorized the making of a new note, like the one on which this suit is brought, is a distinct question, which I conceive does not arise in the case. The jury have found that this

was the note intended by the power ; and I think the evidence justifies their conclusion. But whether it does or not, is not material upon this application. It is founded on an exception to the opinion of the judge, in refusing to nonsuit the plaintiffs ; and not on the ground that the verdict is against evidence. A new trial must be denied.

ALBANY,
Oct. 1826.

Fort
v.
Smalley.

New trial denied.

FORT against SMALLEY and RATMOUR.

ON error from the *Madison C. P.* The action below was replevin by *Fort* against *Smalley* and *Ratmour*.

The proceedings were by *plaint*. The record contained a *placita* of *June 15th*, 1824. It then stated that *Smalley* and *Ratmour* were summoned to appear, and did appear in the *C. P.* on the same *15th* of *June* ; and that "*Fort* does not farther prosecute his bill or action of replevin," &c. Then judgment for the defendants for costs. The record was signed *October 16th*, 1824.

A defendant in replevin, whether sued by *plaint* or *writ*, may *non pros* the plaintiff.

But it is error, if it appear on the record, that the *non pros* was of the same term with the return of the process.

J. A. Spencer, for the plaintiff in error.

G. C. Bronson, contra.

Curia, per *SAVAGE*, Ch. J. There are two questions to be decided ; 1. Can a plaintiff in replevin be nonprossed ? 2. If he can, is not the judgment premature, being on the return of the *plaint* ?

The first point was considered at the last term, (a) on a motion for a mandamus to vacate a rule made by the court below in this cause ; and we see no reason to change the opinion we then expressed. By the statute, (1 *R. L.* 91,) two modes of proceeding, by *writ* and by *plaint*, are authorized : the *plaint* to be returned to the next common Pleas ; "and the like proceedings shall thereupon be had, in the same court, as may, or ought to be had upon a writ of replevin."

(a) Vid. ante, 43.

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The eleventh section of the act concerning costs, (1 R L. 345,) provides, that where any person shall sue out of any court, any process against any person, who shall be imprisoned on the same, or put in bail, or cause his appearance to be entered, if the plaintiff shall not declare before the end of the next term, the court may adjudge costs to the defendant. The judgment of *non pros* is not mentioned by name; but, by the practice of the courts, that judgment is rendered for not declaring; and if a plaintiff is to be considered process within the meaning of the act, costs may be awarded in that case. If a plaintiff is not technically process, still the same result will follow, as, by the act concerning replevin, the same proceedings are to be had upon a plaintiff, as upon a writ of replevin.

According to the English practice, the action is commenced either by writ or plaintiff, as with us. There, if the defendant wish to expedite the plaintiff, he must enter his appearance and rule the plaintiff to declare. If he do not, the defendant may sign judgment of *non pros*. (2 Archb. Pr. 68.) No distinction is made, whether the suit be commenced by writ or by plaintiff. There too, as here, the plaintiff, before he executes a plaintiff, takes a bond with sureties. But that makes no difference as to the mode of conducting the suit.

Whether, therefore, we follow the English practice, or look solely at our own statute, I think it is regular to enter a judgment of *non pros*, in replevin, as in other actions. But, by the record in this case, the judgment seems to be entered at the return of the process. This is premature and erroneous: and the judgment must be reversed for this cause.

Judgment reversed.

ALBANY,
Oct. 1826.Murray
v.
Mumford.MURRAY *against* MUMFORD.

DETINUE, for certain books of account; tried at the New-York circuit, April 15th, 1824, before EDWARDS, C. Judge;

When it appeared, that *Murray*, the plaintiff, and one *J. P. Mumford*, were partners in trade, under the firm of *Murray & Mumford*. That their partnership was dissolved in 1806, by mutual consent, *Mumford* retaining possession of the books of account, and choses in action belonging to the firm, for the purpose of settling the partnership concerns. He subsequently died; and this action was brought by the plaintiff, as surviving partner, to recover possession of the books belonging to the firm. They were admitted at the trial, to be in possession of the defendant, the administrator of *J. P. Mumford*; but

The judge nonsuited the plaintiff, on the ground that, by the dissolution of the partnership, before the death of *Mumford*, the partners became tenants in common of the books; and that, therefore, the plaintiff was not entitled, as survivor, to the exclusive possession of them.

The plaintiff excepted; and a motion was now made, on the bill of exceptions, to set aside the nonsuit, and for a new trial.

H. D. Sedgwick and *R. Sedgwick*, for the plaintiff, cited *Wallace v. Fitzsimmons*, (1 Dal. 248, 250;) *M'Cartey v. Nixon*, (2 Dal. 65, note;) and *Gow on Partnership*, Am. ed. 312.

J. Bulkley, contra, cited 1 *East*, 367; *id.* 366, note; 1 *Ld. Raym.* 340; 1 *Madd. Ch.* 177; 1 *Ves. sen.* 242, 3; 5 *Ves. jun.* 539; 8 *Vin. Abr.* 25.

ces of debt.

The dissolution of a partnership by mutual consent, does not, *ipso facto*, render the partners mere tenants in common of the books and other choses in action belonging to the firm. The partnership still continues, for the purpose of collecting and paying debts; with all the incidents belonging to that relation.

On the death of one partner, all the debts, and other choses in action, with the books and evidences of debt, as incidents, survive, and belong exclusively to the surviving partner, who must collect debts, and is liable to suits for debts in his own name alone; subject, however, to account for the partnership property to the representatives of the deceased partner.

And so, tho' the partnership be dissolved by mutual consent, during the lifetime of the deceased partner.

And, in either case, the survivor may maintain detinue against the representative of the deceased partner, for the books of account, and other evidences

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Murray
v.
Mumford

Curia, per SUTHERLAND, J. A dissolution of a partnership does not, I apprehend, *ipso facto*, destroy the joint tenancy of the partners in the partnership property, and create a tenancy in common. They are still partners, for the purpose of settling the partnership concerns; and until that is effected. For that purpose, the partnership may be said still to continue, with all the incidents belonging to that relation. (11 *Ves.* 5. 16 *Ves.* 57. 1 *Swanston*, 480, 507, note a. 15 *Ves.* 227.) In *Wood v. Braddick*, (1 *Taunt.* 104,) *Heath, J.* says, "It is a very clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future."

Suppose, which is alleged to be the case, that at the time of *Mumford's* death, there were still debts due to and from the firm; could the representatives of *Mumford* sue, or be sued with the surviving partner, for those debts? Most clearly not. The action must be brought by and against the surviving partner alone. The case of *Smith and others, assignees, &c. v. Stokes*, (1 *East*, 363,) relied on by the defendant's counsel, is entirely different from this, and depending upon a different principle. That was an action of trover brought by the plaintiffs, as assignees of one *Richardson*, a bankrupt. *Richardson* and one *Strickland* were partners in trade. On the 29th of January, 1800, *Richardson* committed an act of bankruptcy. On the 31st of the same month, the goods for which the action was brought, being partnership property, were received by the defendant, *Stokes*. On the 8th of February, a commission of bankruptcy issued against *Richardson*. On the 14th of the same month, *Strickland*, the other partner, died, making *Stokes*, the defendant, his executor. On the 7th of March, the commissioners, under the commission of bankrupt against *Richardson*, executed an assignment of his effects to the plaintiffs, who brought the action against the executor of the deceased partner. It was held that the action would not lie: that though the assignment under the commission was not made until after the death of *Strickland*; yet, when made, it took ef-

fect by relation, from the time of the act of bankruptcy of *Richardson*, which was before *Strickland's* death : that the assignees, of course, became tenants in common by relation from that time with *Strickland*, in his life time, and, since his decease, with his representatives, of whom the defendant was one. Then the familiar principle, that one tenant in common cannot, (except under special circumstances,) sustain trover against another, applied. The partnership was dissolved by the act of bankruptcy, and the assignees became not partners, but tenants in common with the other partner, in the partnership property. It was the same as if the interest of the bankrupt partner had been sold upon execution, and purchased by the plaintiffs. The sale would have produced a termination of the partnership as to him, and the vendee would not have become a partner, but a tenant in common with the other partner. (*Sayer v. Bennet*, 1 *Mont. on Partn.* 17, notes. *Gow on Partn.* 285.)

This case, therefore, stands precisely as it would have done, if the partnership of *Murray* and *Mumford* had continued until *Mumford's* death ; and it is unnecessary to cite authorities, to show that, in such a case, the surviving partner is entitled to all the choses in action, and other evidences of debt belonging to the firm. They must be collected in his name ; and he is entitled to the exclusive custody and control of them. The books of account are incidents to the debts or choses in action ; and whoever is entitled to the one is, of course, to the other. The right of action, in relation to all partnership demands, is transferred to the surviving partner. But he is liable to account to the representatives of the deceased partner, for his share of the partnership property. (*Gow*, 157. 7 *Mass. Rep.* 257. 1 *Dall.* 248. 2 *Dall.* 65. 5 *Sergt. & Rawle*, 86. 1 *Ld. Raym.* 340. *John. Dig. Partnership*, iv. *Watson on Partn.* 364. *Salk.* 444.)

The nonsuit must, therefore, be set aside ; and a new trial be granted.

New trial granted.

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Murray
v.
Mumford.

ALBANY,
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Jackson
v.
Shepherd.

JACKSON, *ex. dem.* WOODRUFF and others, *against*
SHEPHERD.

A deed, or other exhibit, proved under a commission, must, in general, be annexed to, and returned with the commission.

But where it is in the custody of the law; e. g. being a deed of a military lot, deposited with the clerk of the county of Cayuga, and forming part of the records of that county; annexing a copy is sufficient, and the exhibit may be produced on the trial, separate from the commission.

EJECTMENT, for part of a military lot, in *Cicero, Onondaga* county; tried at the circuit in that county, *March, 1826*, before THROOP, C. Judge.

At the trial, in the course of the plaintiff's evidence, it became necessary for him to prove a deed deposited in, and belonging to the clerk's office of the county of *Cayuga*, pursuant to statute. The execution of this deed was proved under a commission executed in *Connecticut*. The clerk of *Cayuga* attended with, and exhibited the deed before the commissioners; and a copy of the deed was annexed to the commission, but not the original. The latter was, however, produced at the trial.

But because the original was not annexed, the judge, at the circuit, rejected the evidence of its execution; and the plaintiff was nonsuited, for the defect which such want of proof occasioned in his chain of title.

A motion was now made, in behalf of the plaintiff, to set aside the nonsuit; and for a new trial.

G. C. Bronson, for the motion.

C. P. Kirkland, contra.

Curia, per SAVAGE, Ch. J. The act regulating the execution of commissions, (1 *R. L.* 520, s. 11,) requires that all exhibits produced to the commissioners, and proved by any witness, shall be annexed to the commission, and returned to the court, closed up and under the seals of two or more of the commissioners. In *Jackson v. Hobby*, (20 *John.* 361,) *Platt, J.* who delivered the opinion of the court, says of this act, "when a statute makes innovations on the common law rules of evidence, its positive requirements must be strictly complied with." But in this case, a literal compliance was impossible. The exhibit produced, was a record of *Cayuga* county; not

subject to the control of the party or commissioners. Every thing possible was done to identify the paper ; and no doubt can exist that the same deed was produced in court, which was proved before the commissioners. We think the peculiar circumstances of this case form an exception to the rule, as laid down in *Jackson v. Hobby*. The nonsuit must, therefore, be set aside ; and a new trial granted.

ALBANY,
Oct. 1826.

Gale
v.
Nixon.

New trial granted.

GALE against NIXON and NIXON.

ON error from the C. P. of *Tioga*. The action in the court below was *indebitatus assumpsit* by the plaintiff against the defendants. The declaration contained counts for lands bargained and sold ; for lands bargained, sold, and possession given ; and lands sold and conveyed ; with the money counts. Plea, the general issue.

On the trial in the court below, the plaintiff relied on articles of agreement signed and sealed by the plaintiff only ; and delivered to, and accepted by the defendants, dated *April 14th*, 1821. These articles purported to be by

Semble, that a contract for the sale of lands, signed and sealed by the vendor only, and delivered to, and accepted by the vendee ; and which purports to contain, on the part of the latter, a covenant to pay the consideration

money, may be enforced against the latter by an action of *assumpsit*.

And where such a contract was recognized and ratified on the part of the vendees, by an endorsement under their hands and seals ; *held*, that this was a sufficient signing to take the case out of the statute of frauds.

The endorsement not containing, in itself, or amounting, when taken in connexion with the original contract, to a covenant to pay, and the vendor having tendered a conveyance, *held*, that he might maintain *indebitatus assumpsit* for the consideration money.

But if the endorsement had amounted to a covenant to pay, the action must have been covenant or debt.

The covenant by the vendor, was to convey within two years from the date ; and the contract purported to contain a covenant, on the part of the vendees, to pay on receiving the conveyance. The latter took immediate possession, pursuant to another covenant in the contract on the part of the vendor ; and by an arrangement between the parties and A., part of the premises were conveyed to the vendees by A., within the two years, A. having title ; but the time had elapsed when the conveyance for the residue was tendered ; and for that reason the vendees refused to receive the conveyance ; yet, *held*, that the contract was not rescinded ; and that the vendees were liable in *indebitatus assumpsit* for the consideration money.

To avoid this, the vendees should have re-delivered possession ; and rescinded the contract *in toto*.

To warrant an action of covenant, the contract must be sealed by the party or his attorney. A mere recognition of the contract, though under seal, will not sustain the action.

A written recognition of a contract, void by the statute of frauds, though after it is entered into, will make it binding.

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Oct. 1836.

Gale
v
Nixon.

both parties ; naming the plaintiff as one part ; and the defendants, *W. & G. Nixon*, as of the other. The plaintiff, for the consideration of \$300 to him paid, and of \$500 to be paid, as therein after mentioned, covenanted to convey, within 2 years, at his own costs and charges, two described parcels of land, of 60 and 80 acres, to the defendants in fee ; and the defendants covenanted to pay the plaintiff, on the execution of the conveyance, \$500. It was also agreed, that the defendants might take immediate possession of the premises ; and continue so in possession, taking the profits, till the conveyance should be executed. On the articles, was an endorsement dated *May 31st*, 1822, under the hand and seal of *J. & W. Nixon*, stating that they had, on the part of *W. & G. Nixon*, the defendants, with the consent of the plaintiff, entered into an arrangement with *T. Astley*, for the purchase of one of the described parcels, (the 80 acre lot,) and given their bond to *Astley*, for the balance on that lot, \$391,42 ; and that they had taken *Astley's* bond to them for a deed ; and that they did thereby discharge the plaintiff from so much of his agreement as bound him to convey this described parcel. Afterwards, the defendants paid this balance to *Astley*, who owned the 80 acre lot, and took a deed of him, within two years from the date of the articles. The payment to, and conveyance by *Astley*, were pursuant to the agreement and understanding of both the parties to this suit, who agreed that the payment of the \$391,42 should apply on the articles between them. A few weeks after the date of the articles, the defendants took possession of both parcels ; and remained in possession up to the time of the trial. The plaintiff had caused a deed with warranty to be tendered to the defendants, for the 60 acre lot, before suit brought in the court below ; but more than two years from the date of the articles. This deed was produced ready for them, at the trial.

The defendants moved the court below for a nonsuit, on these grounds : 1. That the articles were not signed by the defendants. 2. They being sealed, the action should have been covenant. The contract of the plaintiff,

not having been fulfilled, there was no express or implied promise to pay. 3. For the 80 acres, a deed was received from *Astley*, before the contract expired; and the deed for the 60 acre lot was not tendered till after the contract had expired.

The motion was granted, and the plaintiff excepted.

E. Dana, for the plaintiff in error. 1. Part performance, as payment, and taking possession, removes the objection arising from the statute of frauds, though the vendor only sign the contract, if it be delivered to the purchaser. (*Str.* 783. 1 *Com. on Contr.* 80. 3 *John. Cas.* 65. 2 *Caines*, 120.) 2. The defendants, by the endorsement, ratified the original agreement. It is equivalent to signing. Yet, as it contained no express covenant to pay, covenant will not lie. Assumpsit is the proper action. 3. If the defendants had a right to rescind, they have not exercised that right. To do so, they should have offered to reinstate the plaintiff by a surrender of possession, and a conveyance of the 80 acres.

The plaintiff is without remedy, unless he can recover in this form of action. He cannot recover back the land conveyed.

A. Collins, contra. The contract was within the statute of frauds, (1 *R. L.* 78, s. 10.) The signature endorsed was long after the date of the articles. If any action will lie, it is covenant. The covenant to pay was dependent. (10 *John.* 266.) The tender of the deed at the day, was a condition precedent; and the time having elapsed before the tender, all remedy was forfeited. The declaration was for lands sold and conveyed; but the defendant never accepted a conveyance. There was, then, a variance between the declaration and proof. Acceptance of a deed is essential to its validity. (1 *John. Cas.* 114. 12 *John.* 418.) No title having vested, there was nothing to raise an implied assumpsit as for land sold. Assumpsit will not lie for lands bargained and sold, but not conveyed. The plaintiff's remedy is, to recover back the land.

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Curia, per SUTHERLAND, J. The plaintiff was nonsuited at the trial; his right to recover being objected to on three grounds:

1. That the contract was within the statute of frauds, not being signed by the defendants. 2. That if it was a valid contract, it being sealed, the action should have been covenant. 3. That the deed not having been tendered by the plaintiff, until after the time stipulated, and the contract, therefore, not having been fulfilled on his part, there could be no implied promise, on the part of the defendants, to pay.

The article of agreement contains a perfect contract between the parties. It specified particularly what was to be done by each party. It was sealed by the plaintiff, and delivered to the defendants, who took possession of the land under it; and the only objection to it is, that it was not signed by the defendants.

It is not necessary, in this case, to decide whether the action could be sustained merely upon the signature of the plaintiff to the contract, and the acceptance of it, together with the possession of the land, by the defendants, though I am inclined to think that it could. (1 *Eq. Cas. Abr.* 21, pl. 10. 1 *Powell on Cont.* 286. *Ballard v. Walker*, 3 *John. Cas.* 60. *Roget v. Merritt & Clapp*, 2 *Caines*, 120, *per Spencer, J.* 1 *Fonbl.* 165, 166.)

But the indorsement on the back of the contract, signed by both of the defendants, is clearly sufficient to take the case out of the statute, although made at a subsequent period. It is a full and complete recognition of the contract. It releases the plaintiff from the performance of one part of it. It is not necessary that the identical agreement should be signed; but if it is acknowledged by any other instrument duly signed, it is sufficient. (*Rob. on Frauds*, 121. *Welford v. Beazly*, 3 *Atk.* 503. 3 *Bro. Ch. Rep.* 318. 1 *Ves.* 6. 9 *Ves.* 355. 1 *Com. on Contr.* 109, 110.)

Assumpsit was the proper form of action. Covenant will lie only where the instrument is actually signed and sealed by the party, or by his authority. A recognition

of the contract, though in writing and under seal, will not make it a covenant. If the instrument by which the original contract is admitted, contain, in itself, a specification of the terms, and consideration of the contract, an action perhaps might be sustained upon that ; and in such case, if it was under seal, the action must be either debt or covenant.

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Under the circumstances of this case, it is not material that the deed was not tendered on the day fixed by the contract. The defendants were in possession of the land. They had, by a mutual arrangement between the parties, taken a deed from *Asiley* for the largest parcel. They do not offer to deliver up possession of the land, and rescind the contract ; but seek to retain the land, and avoid paying the stipulated price. This they cannot do. They must either avoid the contract *in toto*, or else perform.

The plaintiff was improperly nonsuited, and the judgment must be reversed.

Judgment reversed.

NORRIS *against* BADGER & CALDWELL.

ASSUMPSIT ; tried at the *Onondaga* circuit, *March 20th*, 1826, before THROOP, C. Judge.

In a suit by
endorsee a-
gainst endors-
ers, the bill of
particulars
stated the en-
dorsement in

The declaration was against the defendants as joint endorsers to the plaintiff of a promissory note, also endorsed blank. This was filled up on the trial. *Held*, no variance.

One issue was on the sufficiency of G.'s property to satisfy a certain judgment and execution. *Held*, that the amount of previous incumbrances on the same property, was within the issue, and might be inquired of on the trial.

The party interested to show the insufficiency of the property was allowed to give parol evidence of judgments, &c. on cross examining a witness introduced by the opposite party, though the latter objected to this, and excepted, taking a bill of exceptions. The same bill stated, that previous incumbrances, sufficient to reduce the value of the property to nothing, were afterwards duly proved by documental evidence. *Held*, on motion for a new trial, that though the parol evidence was improper, a new trial should not be granted ; that the jury could not have been misled by that evidence ; that, by the party going into documental evidence, he waived that by parol ; and, therefore, no error.

Semb. it would be otherwise, where the parol evidence might possibly have misled the jury, and had not been waived.

An intermediate endorser of a note may sue a previous endorser, without showing actual payment by such intermediate endorser, to any subsequent endorsee, by a receipt ; and without showing an endorsement back to such intermediate endorser. Possession of the note, and producing it in court, are, *prima facie*, sufficient evidence of payment, and he may recover, though his name still remain on the note.

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by the plaintiff to the *Utica Bank*, made by one *Elias Gumaer*, dated *November 23d*, 1821, payable to the order of the defendants at the *Utica Bank*, 90 days after date, for \$3000. It also contained the money counts.

Plea: 1, the general issue; and 3dly, a judgment of \$3000 confessed by *Gumaer* to *Norris*, and *Badger*, one of the defendants, as security and indemnity to the endorser, *February 18th*, 1822, and *October 27th*, 1823, execution issued and delivered to the sheriff, at the instance, and under the sole direction and management of the plaintiff, *Norris*; *Gumaer* then having property, which was bound and levied on, enough to satisfy it; but which was dissipated, and the debt lost through the delay and negligence of the plaintiff. Replication: that *Badger*, not the plaintiff, took the control of the execution; that the debt was not lost by the plaintiff's negligence, &c.; that *Gumaer* had not sufficient property, &c., and collection could not be enforced, &c. Issue to the country.

On the usual order for a bill of particulars, the plaintiff furnished one, in which he set forth the note verbatim, as with a blank endorsement by the defendants.

On the trial, the defendants objected, that a mere blank endorsement would not carry the interest to the plaintiff; on which he filled up the endorsement in the usual form. The defendants then objected that it varied from the bill of particulars; but the objection was overruled.

The defendants then proved that the note was endorsed by both plaintiff and defendants, for the benefit of *Gumaer*; that the money was obtained thereon at the bank, and applied to his use. The maker was himself sworn as a witness for the defendants; and testified, that from the 27th of *October*, 1823, to the *January* next following, he had in his possession personal property to \$800, and real estate worth \$7000. The plaintiff then asked him if there were not incumbrances or liens, previous to the judgment confessed. This question was objected to as improper, under the pleadings, or if admissible, that the facts inquired of, could not be established by parol. The judge overruled the objection; and the witness was allowed to

state large previous incumbrances by mortgage and judgment; and sales thereon.

The plaintiff then offered to show regularly, by records and executions, incumbrances having preference to the judgment and execution mentioned in the defendant's plea, sufficient to exhaust *Gumaer's* property. This was objected to, as not admissible under the pleadings; but the proof was received; and the facts proposed to be shown were fully established by exemplifications, executions, &c.

The defendants then objected, that the note being an accommodation note, the plaintiff could not recover, till he showed actual payment of the money by him; that showing himself in possession of the note was not enough, without having paid the money to the bank. This objection was overruled, the judge charging that the evidence was, *prima facie*, sufficient to sustain the action. The defendants excepted to the several decisions of the judge.

Verdict for the plaintiff, for \$3318,70.

N. P. Randall, for the defendants, now moved for a new trial. He said the note given in evidence was inadmissible under the bill of particulars. (1 *Chit. Pl.* 382.) But if admissible, being an accommodation note, the plaintiff, an intermediate endorsee, could not recover, before actual payment to the subsequent holder, the bank. Endorsers on accommodation paper, are sureties; (16 *John.* 70;) who cannot recover till they have incurred actual expenses. (8 *East*, 593.) The liability of the plaintiff was no more than that of the defendants, who endorsed before him. The bank may still sue the latter. In ordinary cases, where the note is voidable for want of consideration or otherwise, the endorsee must show that he took it in the fair course of trade, and paid a valuable consideration. (1 *Campb.* 100.) That is not done in this case. It is not pretended that this is a note taken in the course of trade. But even if it was so taken, the plaintiff must show payment to the bank, his endorsee, or some endorsee subsequent to him. (1 *Ld. Raym.* 742. 4 *T. R.* 714.) And this is especially so of accommodation paper. (3 *Wils.*

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13, 346. 1 *H. Bl.* 640. 1 *Cowen*, 394, *per Woodworth, J.*) When the endorser pays, he is remitted to his original rights of holder; and not till then. Before this, he is not in a situation to maintain an action. Possession of the note by the plaintiff, is not, in the case of accommodation paper, *prima facie*, evidence of payment. Indeed, it is not so in any case. (*Welch v. Lindo*, 7 *Cranch*, 159. *Gorgerat v. M'Carty*, 1 *Yeates*, 94.)

Proof of incumbrances was inadmissible under the pleadings. The issue was on the amount of property bound by the execution; not whether there were incumbrances. The evidence offered, admits the amount of property; but seeks to avoid the consequences by showing incumbrances. The replication is like one to a plea of an outstanding judgment, by an executor. Admitting the judgment, execution and lien, it should have replied the previous incumbrances specially, or any other matter in avoidance. Evidence cannot be given of matters out of the issue. (1 *Phil. Ev.* 131. 3 *Mass. Rep.* 552. 11 *id.* 313.)

But if this evidence was admissible, there can be no doubt that the manner in which it was given, in the first place, was improper. The record evidence alone should have been received. Parol proof was clearly inadmissible. (*Bull. N. P.* 293.)

There can be no doubt, that, if the plaintiff has lost the benefit of the judgment by his laches, this deprives him of all right to recover. (2 *Phil. Ev.* 21, *note*. 7 *John.* 332. 1 *B. & P.* 422.)

J. L. Edwards and *S. Beardsley*, contra. The variance from the bill of particulars, was produced by the filling up of the blank endorsement on the trial, which is mere matter of form. It was substantially the same before; and a literal correspondence was not necessary.

The possession of the note, and its production on the trial, were *prima facie* evidence that it had been paid, if such proof was necessary. There being nothing to rebut it, the note must be taken to have been paid. (3 *John.*

Cas. 5, 260, 263. Doug. 636. Chit. on Bills, ed. 1821, p. 14, note (1) and the cases there cited. 3 Wheat. 182, 3. 2 Dall. 147. 15 Mass. Rep. 436. 11 John. 53.) If the defendants had any objection founded on the original consideration, the *onus* lay with them. (*Chit. on Bills, old ed. 86. 7 John. 361. 2 Campb. 439, 440.*) The only question is, what shall be evidence of payment? We admit, with the cases cited on the other side, that when one has endorsed a bill, and he would then sue upon a previous endorsement to himself, he must show payment. But those cases do not go to the evidence. The mere want of consideration between the original parties, is no answer. Holding the note, the plaintiff may fill up the endorsement to himself; and it does not lie with the defendants to object, though he was a mere trustee for the bank. (*7 John. 361. 2 Campb. 339, 40. id. 5, & 574. 1 B. & P. 648. 4 Esp. Rep. 56.*)

The proof of previous liens, was clearly admissible. Admit the issue to have been on the sufficiency of the property bound by the judgment or execution mentioned in the plea; how could that be determined, without looking to the amount of the previous charges on the property, which reduced it to nothing, and less than nothing?

The proof by parol was proper. It was like asking a man, "what are you worth?" In answer, he is bound to state incumbrances. But whether proper or not, was immaterial; for the defendants could not succeed in any view. They failed altogether to show any exclusive control over, or neglect concerning the execution on the plaintiff's part. Beside, the parol evidence came out collaterally, on cross examination of the defendant's witness. It was proper, with a view to test his accuracy or credibility. If proper in any view, a new trial should not be granted; and the court will not incline to a new trial, especially when they see that the very facts enquired of from the witness were most abundantly established by documentary evidence. Indeed, this alone is a full answer to the point arising upon the parol evidence.

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Again; the judgment confessed was a mere collateral security; and whether the plaintiff was negligent or not, makes no difference with his rights. He might entirely disregard it, and look to his endorers in the first instance. *Badger* should have seen to his rights, and gone on, and collected himself.

Randall, in reply. Gentlemen argue as if this were a case upon the weight of evidence before the jury. On a bill of exceptions, we cannot look beyond the very points taken. If the parol evidence, was, *per se*, improper, we must stop there; and cannot excuse its admission by other matter afterwards supplied, as may be done on a case, where the court have a discretion. That *Gumaer* was the defendant's witness, is no excuse for the plaintiff's proving by him what he should have shown by documents. When he takes the witness on cross examination to an independent fact, he makes him *quoad hoc* his own witness.

Curia, per SAVAGE, Ch. J. The variance between the endorsement stated in the bill of particulars, and that filled up and used on the trial, was immaterial. The blank endorsement mentioned in the bill, imported as much as if the formal words had been written over it. It is enough, that the bill and the proof agreed in substance. *Beside*, the note and endorsement were specially set forth in the declaration. There was no need of particulars as to these. It was necessary under the money counts only, which may be laid out of view.

There is no doubt, the evidence of incumbrances was admissible. It went directly to the sufficiency of the property to satisfy the judgment.

The principal question is, whether the plaintiff was bound to show actual payment of the note, beside what was to be inferred from the fact of its being in his possession. In *Mendez v. Carreroon*, (1 *Ld. Raym.* 742,) it was decided, that in an action on a bill of exchange, brought by an endorser who had been sued upon it, against the acceptor, the plaintiff must prove that he had paid the party who sued him.

In *Welch v. Lindo* (7 Cranch, 159,) it was held that the mere possession of a promissory note, by an endorsee who had endorsed it to another, is not sufficient evidence of his right of action against his endorser, without a reassignment or receipt from the last endorsee. But the same court who decided this case, afterwards, in *Dugan v. The United States*, (3 Wheat. 173, 183,) held, that "if a person who endorses a bill to another, whether for value or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the *bona fide* holder and proprietor of such bill; and shall be entitled to recover thereon, notwithstanding there may be on it one or more endorsements in full, subsequent to the endorsement to him, without producing any receipt or endorsement back to him from either of such endorsees, whose names he may strike from the bill or not, as he thinks proper." The principle of this case is so precisely applicable, that I need cite no other, if it is to be received as authority. The same principle will be found running through a series of decisions in this court. (3 John. Cas. 263. 11 John. 53. 16 *id.* 73. 1 Cowen, 387. *Vid. also* 17 Mass. Rep. 618. *Chit. on Bills.* 190. *Phil. ed.* 1821.)

The judge erred in receiving parol evidence of the amount of incumbrances; and this would be cause for a new trial, had it not been immediately shown by proper documentary evidence, viz. exemplifications, &c. that the older liens on *Gumaer's* property, greatly exceeded its value. The parol evidence was unnecessary, therefore. The verdict was fully sustained without it. Its admission might be error, had it been possible that the jury placed any reliance upon it, or could have been misled by it; (16 John. 92; 3 Cowen, 621;) and then, this being on bill of exceptions, there should be a new trial, because the judgment we render might be reversed on error, which it is the object of this motion to guard against. Going into the documental proof, was equivalent to a waiver of the parol evidence, which takes away the error. (16 John. 92.) It could not possi-

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bly have any effect; and the point, we think, cannot be regarded on writ of error. The motion for a new trial must, therefore, be denied.

New trial denied.

DANIEL S. GRISWOLD *against* SEDGWICK and others.

If process against the body, out of any court, do not, on its face, authorize an arrest, it is void, and will not protect any person concerned in the arrest; even the officer to whom directed.

Where DANIEL S. Griswold was arrested on process of attachment, issued out of the equity side of the circuit court of the United States, against SAMUEL S. Griswold; held,

that an action of false imprisonment, lay by DANIEL S. Griswold against the marshal, his deputy, and the solicitors concerned in the arrest; and this, although DANIEL S. Griswold was the person intended.

Otherwise, of an execution against one by a wrong name, who appears in the suit, and omits to plead the misnomer in abatement; or, *it seems*, where he is known as well by the one name as the other.

It is no objection to process issued to enforce an order of the circuit court of the United States, that it recites the order as having been made, on some day not appearing necessarily to be within the statute term of the court. It will be intended that the term continued to that day, unless the contrary appear, the duration of the term not being limited by statute.

Whether process issuing out of a court of equity, be according to the course and practice of that court, is a question which cannot be tried collaterally, in an action at law. If it be irregular, the proper course is to move the court out of which it issued, to set it aside.

Superior courts, either of law or equity, will not interfere with each other's proceedings on the ground of irregularity.

ted that he was the person intended to be arrested on the writ or process. He was accordingly discharged; and this suit was against the defendants, the Messrs. *Sedgwick, Morris* and *Reid*, all the parties instrumental in his arrest.

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The process recited, that on the 21st day of *February*, 1824, by an order made in the circuit court, by *Wm. P. Van Ness*, one of the judges of that court, in a cause there between *DANIEL S. Griswold*, complainant, and *Hill*, defendant, that *Griswold* pay to the clerk of that court \$1,200, in 10 days after notice of the order; and "whereas the said *SAMUEL S. Griswold*" had neglected to comply with the order, though more than 10 days had elapsed, it commanded the marshal to take the said *SAMUEL S. Griswold*, &c., and keep him in custody, till he should perform the order, or until the court should make order to the contrary. The process was tested the 2^d day of *February*, 1824, and returnable the 1st *Monday* of *March*. The plaintiff was arrested, discharged as before mentioned; and the process returned by the marshal *non est*, &c.

On this evidence, the counsel for the defendants moved for a nonsuit, which was granted by the judge, and the plaintiff excepted.

On the bill of exceptions,

H. W. Warner, for the plaintiff, now moved to set aside the nonsuit, and for a new trial. He said the plaintiff is not the person named in the precept of the writ. It is not sufficient that he was the person intended. (6 *T. R.* 234. 8 *East*, 328. 2 *Taunt.* 399. 2 *Campb.* 270. *Doug.* 40. 1 *B. & A.* 642.)

But if the plaintiff had been rightly named, it appears by the writ itself, that he was in no default under the order recited. No notice of the order is mentioned. And the writ is tested the 2^d of *February*, at a time before the order was made. The teste is out of term; and the writ thus being irregular on its face, will not protect the officer, or any one concerned in its execution. Taken as a whole, the writ is unknown to the law of the land; and obvious-

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ly not necessary for enforcing the order. The court will take notice of the practice of the court of chancery. (1 *Chit. Pl.* 224. 2 *Co. Rep.* 18. 16 *East*, 39.) This was neither an attachment nor execution. The plaintiff could not have had any sufficient notice of the order, and the court was entirely without jurisdiction. The course of proceeding on the equity side, is regulated by rules of the *U. States* supreme court, pursuant to statute. (See rules, 7 *Wheat. Rep.* v. to xiii.) By rule 33, where they do not apply, the English practice governs. (And vid. 3 *Wheat.* 213.) That practice will be found in *Newland's Treatise*, under the head, *Execution of Decrees*. The parties should show the proceedings to be regular, and according to the course of the court. (2 *Wils.* 224.) Though it may be otherwise, where the defendant has appeared, and had a chance of defence. There, even a misnomer in the execution, will not subject the plaintiff to an action, if it follow the name in the record. (2 *Str.* 1218.) It will be seen by *Newland*, already cited, that this process could not be regular as an execution. It was equally irregular as an attachment. (1 *Jac. & Walk.* 637.) It is not an order of a circuit court. This requires the concurrence of a circuit and district judge. It was a mere order of judge *Van Ness*, at his chambers in vacation. It does not appear for whose benefit the money was to be paid into court. The court is of a limited and special jurisdiction, (5 *Cranch*, 185,) and should show their authority clearly, to issue such a writ. The jurisdiction of every court may be enquired into and impeached. (4 *Cowen*, 294, 5.) If there be a want of jurisdiction, the process will protect nobody.

R. Sedgwick and *Sullivan*, contra. The writ was founded upon, and authorized by the order. The plaintiff was, at first, rightly named; and the wrong name afterwards may be rejected as surplusage. On the whole face of the process, the court can see that the right man has been taken. It recites the contempt; and the teste is obviously a mere clerical mistake, as the court cannot help see-

ing. It is plain from the writ itself. It recites that more than 10 days had elapsed from the making of the order.

As to the misnomer ; admitting it to be a fatal one, the cases cited to show that false imprisonment will lie, are of mesne process ; and even in respect to this, they are not without qualification. Suppose the defendant being misnamed, appears by his right name, as he may do, (1 *B. & P.* 645,) the suit may go on against him, by his true name, to judgment and execution. So if he appear in any way, and do not plead the misnomer in abatement. (2 *Str.* 1218.) Clearly, in neither of these cases would false imprisonment lie. The proceedings become good *ab initio* ; and in the latter case, it is settled that execution may go by the wrong name. (*id.*) In general, the distinction is between mesne and final process. A misnomer in the latter, will not subject to an action for the arrest. (*id.* 1 *Mass. Rep.* 76.) The mistake is amendable. (1 *Brod. & Bing.* 188.) The process is not merely void. The *U. States* statute of jeofails, is even broader than our own or the English. (*Ing. Dig. Abatement.*) If this court are, as contended, to look into the practice of the circuit court of the *United States*, it will be seen that the writ would have been at once amended on motion there.

But this court will not look into the proceedings, with a view to see whether they were regular or irregular, void or voidable. The circuit court might have been continued by adjournment from its term to the teste day, and to a time long after the order and arrest were made. Jurisdiction will be intended till the contrary is shown. A court of equity is always open. It is not confined to particular terms ; and it has power to modify its process to suit the exigencies of each case. How is this court to know what process is held to be proper there ? It is only in the absence of any practice of their own, that the English practice is to govern. How is this court to know that the English practice is not abolished in any particular case, and a new one substituted ? If this process had issued out of the court of chancery of this state, the present suit would have been arrested by injunction ; upon the princi-

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ple that another court have a right to, and will protect all those who act under its process; or will, at least, take the supervision of its own process, and the conduct of those who act under it, to itself. (*Eden on Inj.* 27. 2 *Dick.* 619. 1 *Jac. & Walk.* 638) This is right; and what every superior court insists upon. It is well settled in this court, that no suit will lie, grounded on the irregularity of process, until it is set aside on motion. (*Reynolds v. Corp & Douglass*, 3 *Caines' Rep.* 267.) On applications to set aside writs for any defect, nothing is more usual than for the court to order an amendment, without any formal cross-motion for the purpose; or, if the motion be for irregularity, they will require the party moving, to stipulate that he will not bring any action. One court cannot decide on the regularity of process issuing from another court, over which it has no control, until that process is set aside. The defendants are officers; and are justified by the process. At any rate, it being in existence, never set aside or avoided in any way, they are protected against an action of false imprisonment. If liable to any action, it must be founded on an abuse of the process, and should have been *case*, not *trespass*.

Curia, per SUTHERLAND, J. If the process, on the face of it, did not authorize the arrest of the plaintiff, then it was irregular and void as against him, and can afford no justification to any of the parties concerned in the issuing or execution of it. In such a case, it is not necessary that the process should be set aside before an action can be sustained; nor is it material out of what jurisdiction it purports to have been issued. The defendants justify the arrest of *Daniel S. Griswold*, under an execution against *Samuel S. Griswold*. The execution itself may be regular; there may be no ground for setting it aside. *A.* is arrested by the defendants, and calls upon them to show their authority for the arrest. They produce as their authority, an execution against *B.*, issued out of the circuit court of the *U. S.* for the southern district of *New-York*. We do not question the jurisdiction of that court, nor the

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validity or regularity of any of its proceedings, when we decide that this is no justification for the arrest.

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It is settled by repeated adjudications, that an officer cannot justify the taking of the goods (much more the person) of *A.*, under process against *B.*, although it be averred that *A.* and *B.* are the same person; unless the party appeared and had an opportunity of pleading the misnomer in abatement; but omitted to do it. Thus, in *Cole v. Hindson and others*, (6 T. R. 234,) the goods of *Aquila Cole* were taken under a distringas against *Richard Cole*. To an action of trespass brought for the taking, the defendants pleaded that the plaintiff, *Aquila Cole*, being indebted to two of them, they sued out against the said *Aquila*, by the name of *Richard*, a writ; and the said *Aquila* not appearing, &c., a distringas was issued, commanding the sheriff to distrain *Richard Cole*, meaning the said *Aquila Cole*, &c. Upon demurrer, the plea was held to be bad. And lord *Kenyon* remarked, that the defendants were not justified in seizing the goods of *Aquila Cole*, under a distringas against *Richard Cole*, and that the averment in the plea, that *Aquila* and *Richard* are the same person, did not assist them, as they had not also averred that the plaintiff was known as well by one name as by the other.

So in *Shadgett v. Clipson*, (8 East, 328,) *Josiah Shadgett*, the plaintiff, was arrested upon a *latitat* issued against him, wherein he was called by the name of *John Shadgett*. The plea averred that the writ was issued against *Josiah*, by the name of *John*. This was held to be no justification to the officer who made the arrest, in an action for false imprisonment. Lord *Ellenborough* says, process ought regularly to describe the party against whom it is meant to be issued; and the arrest of one person cannot be justified under a writ sued out against another.

In *Wilkes v. Lorck*, (2 Taunt. 400,) it was held by *Lawrence, J.* that the sheriff was liable to an action of false imprisonment, for arresting a defendant by a wrong christian name.

by some matter *dehors* the record, and which, I think, cannot be taken advantage of in this collateral way."

In the case now before us, it is apparent on the face of the process, that it did not authorize the arrest of *Daniel S. Griswold*, the present plaintiff. There is no necessity, therefore, for any inquiry *dehors* the writ itself; and an action may be sustained by the plaintiff for the arrest, without having procured the writ to be set aside.

But it was also contended by the plaintiff's counsel, that the order itself, in obedience to which the writ purports to have been issued, and which is recited in it, was absolutely void; 1. As having been made at the chambers of the judge in vacation; and 2. As being against the settled and established mode of proceeding in such cases in the English court of chancery.

The first objection seems to have no foundation in fact. There is nothing on the face of the order, as recited in the writ, which shows *where* it was made; and it is expressly recited to have been made *in the circuit court for the southern district of New-York*.

But it is said that the 21st of *February*, when the order was made, was not a day in term, and it must, therefore, have been made at chambers. The time for the commencement of the terms of that court, is fixed by law; but I am not aware that the duration of the terms is limited. The 21st of *February* may, therefore, have been a day in term.

As to the other ground of objection, that the order is not in conformity to the established mode of proceeding in courts of equity, it is a sufficient answer, to say that that is a question not to be tried collaterally in an action at law. If the order was unadvisedly made, against the established practice, not only of the courts of equity in England, but of the very court in which it was made, as the objection seems to assume, application should have been made to that court, to vacate or set it aside.

The court had jurisdiction of the person of the plaintiff, and of the subject matter in relation to which the order was made; for it was made in relation to a suit pending in

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Scandover v. Warne, (2 *Campb.* 270,) and *Morgans v. Bridges*, (1 *B. & A.* 647,) are to the same effect.

In *Crawford v. Satchwell*, (2 *Str.* 1218,) it was held that if a person sued by a wrong christian name, omits to take advantage of the misnomer, by a plea in abatement, but suffers judgment to be entered, he shall not have an action of false imprisonment against the sheriff, for arresting him upon a *capias ad satisfaciendum*, issued upon the judgment. Lord *Kenyon*, in *Cole v. Hindson*, already cited, adverts to this case, and says, the party had appeared in the original action, and done an act to avow that he was sued by the right name. That was also the case in *Smith v. Bowker*, (1 *Mass. Rep.* 76.)

No distinction is taken in these cases, between an arrest upon mesne and final process, and none is perceived by the court. In this case, the process was in the nature of an attachment, and the plaintiff has had no opportunity of taking advantage of the misnomer, by plea in abatement.

The case of *Reynolds v. Corp.*, (3 *Caines*, 267,) is not in collision with the cases already adverted to. *Reynolds* had been surrendered by his bail, and was subsequently discharged by a supersedeas, for want of being charged in execution in due time. A *ca. sa.* was afterwards issued upon the judgment, on which he was taken and imprisoned; for which he brought an action of false imprisonment against the plaintiff in the execution, and the attorney who issued it. It was held that the action would not lie; the judgment remaining valid, and nothing appearing on the record to show that a *ca. sa.* could not regularly be issued. The court say, the process was voidable only, and not void; and nothing appearing on the face of the record or of the execution, to show that it had been issued irregularly, the plaintiff should have applied to the court, and had the writ set aside before he brought his action; that they would not decide upon its validity in that collateral way. (*Per Kent, Ch. J.*)

Thompson, J. says, "I am inclined to think the execution is voidable only. It appears regular upon the face of it; it is warranted by the judgment, and is to be avoided

by some matter *dehors* the record, and which, I think, cannot be taken advantage of in this collateral way."

In the case now before us, it is apparent on the face of the process, that it did not authorize the arrest of *Daniel S. Griswold*, the present plaintiff. There is no necessity, therefore, for any inquiry *dehors* the writ itself; and an action may be sustained by the plaintiff for the arrest, without having procured the writ to be set aside.

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that court, in which the plaintiff was a party. The regularity of the order is not to be tried or inquired into in this court. Superior courts, either of law or equity, will not interfere with each other's proceedings, on the ground of irregularity. (3 *John. Ch. Rep.* 275.) And cases are to be found, in which courts of equity have enjoined suits at law, brought for executing the process of those courts irregularly issued. (*Bailey v. Devereux*, 1 *Vern.* 269.) In *Froud v. Lawrence*, (1 *Jac. & Walk.* 636,) an attachment had been irregularly issued, upon which the defendant was arrested. He applied to the court of chancery, and procured it to be set aside; and then brought his action at law for the false imprisonment. The court of chancery, after much deliberation and inquiry, stayed the suit at law; holding, that though the party might be entitled to compensation for the arrest, he must seek it by application to that court, and not by suit at law. The case in 1 *Vernon*, 269, and also *May v. Hook*, before lord *Bathurst*, cited in *Dove v. Dove*, (2 *Dick.* 619,) were relied upon as authorities for this decision. It is not necessary for us to express an opinion upon the principle assumed in these cases. They are cited merely for the purpose of showing the extent to which courts have gone, in denying the right or propriety of one court to inquire into, or try the regularity of the process or proceedings of another court of equal dignity.

The process in this case was undoubtedly intended as an attachment for a contempt in disobeying a previous order of the court. It recites that previous order, and that the plaintiff had neglected to comply with it; and therefore commands the marshal to take his body, &c. It may not be formal. The court out of which it issued, might, upon application, vacate or modify the order, or the attachment. But I see no ground for saying that either the one or the other is absolutely void.

The attachment, on the face of it, did not authorize the arrest of the plaintiff; and on that ground, and that alone, I think the action was technically sustained; and that the plaintiff ought not to have been nonsuited.

Nonsuit set aside.

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Garrow.

ARMSTRONG against GARROW, Sheriff of Cayuga.

ASSUMPSIT, tried at the *Cayuga* circuit, *March*, 1826, before THROOP, C. Judge.

The capias was returnable the *3d Monday of October*, 1825. The declaration was against the defendant, describing him as sheriff of *Cayuga*; and contained the common counts for money had and received, &c.

At the trial, the plaintiff proved a judgment in his favor against *T. Mumford*, for \$436,50, in this court; a *ca. sa.* tested *May* term, 1825, returnable *August* term, 1825, endorsed, "receive \$436,50, and discharge the defendant;" which, it appeared, was returned and filed by the present defendant, *November 26th*, 1825, "satisfied in full."

Here the plaintiff rested. The defendant then objected that the declaration should have been special, and charged that the defendant received the money as sheriff. The judge overruled the objection. The defendant then objected that the action was premature, having been commenced before the actual return of the *ca. sa.* satisfied. The judge sustained this objection, holding that the return was no evidence that the money was received before the *ca. sa.* was returned and filed.

The plaintiff then proved that, about the *1st of September*, 1825, the deputy who held the *ca. sa.*, admitted that he had not, in fact, received the money; but had taken *J. P.'s* note for the amount of the execution, and permitted the defendant to go at large. That the plaintiff's agent then demanded the note of the deputy, which was refused by him. That the capias in this suit was made out the same day; but not till after the demand. The defendant

an escape, or take a new execution. But if the plaintiff ratify the transaction, he may charge the sheriff as for money had and received, with interest on the amount from the return day of the *ca. sa.*; and then, *semble*, the note becomes valid as between the sheriff and the maker.

Where the plaintiff interferes, and directs a deputy sheriff to take a course in the collection of an execution, out of the line required by law: as by giving a credit; selling land for less than the execution; and withholding a deed until the whole shall be paid, &c. he thereby makes the deputy his private special agent, and discharges the sheriff. (*Gorkem v. Gale*, note (s) to this case.)

The return of a sheriff to a *ca. sa.* "satisfied," is evidence that he had received the money before the return day; though the *ca. sa.* be not, in fact, returned and filed till after the return day.

An action for money had and received lies against a sheriff, by one for whom he has collected money on execution.

It need not be averred in the declaration, specially, that he received the money as sheriff.

If the sheriff take a promissory note in satisfaction of a *ca. sa.*, and discharge the defendant, without the authority of the plaintiff, it is void as between the sheriff and the maker; and the plaintiff may sue the sheriff for

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objected that the taking of the note would not support the addition for money had and received.

Verdict for the plaintiff, for the amount of the judgment and interest from the return day of the *ca. sa.* subject to the opinion of this court.

L. F. Stevens, for the plaintiff. The action was properly brought for money had and received; (2 *Saund.* 122, note (2);) and a declaration in the general form is enough. The special character in which the money was received, need not be alleged. The insufficiency of the declaration cannot be urged on a motion for a new trial; but only on demurrer or motion in arrest. (4 *John.* 403.) The sheriff is estopped by his return, to deny the receipt of the money: and the return relates to the return day of the writ, whether actually filed on that day or not. (13 *John.* 530. 14 *id.* 457. 9 *id.* 96. 8 *id.* 20.) Receiving the note was a payment of the debt, as to the sheriff. (11 *John.* 469. 3 *Mass. Rep.* 403. 8 *John.* 20. 3 *id.* 464. 1 *Cowen*, 359. 3 *Cowen*, 272.)

G. C. Bronson, contra, cited 3 *John.* 183; 8 *John.* 98; 7 *id.* 159, 319; 4 *Cowen*, 553.

Curia, per SAVAGE, Ch. J. The general principle is not denied, that this action lies in all cases where any one has received the money of another, and refuses to pay it over. I can see no reason why an officer who has collected money on an execution, and refuses to pay it to the owner, should not be liable as for money had and received. The action is recommended by its simplicity, and should be encouraged where the defendant is in no danger of being misled, or taken by surprise, which cannot be pretended in this case. The sheriff has received money for the plaintiff's use; and having refused to pay it, is rightly prosecuted.

I am of opinion also, that the sheriff, having returned the execution satisfied, thereby admits the receipt of the money which he was directed to receive. This admission may well relate to the return day. The sheriff, by re-

turning the execution satisfied, admits that he executed the writ. He must have done so before the return day ; as he could not, in his official character, enforce payment afterwards : and had he executed the writ by arresting the defendant, the return would have been different.

I shall, however, inquire, whether the sheriff is liable in this action, in consequence of his deputy's taking the note of a third person. The acts of the deputy are the acts of the sheriff, unless the plaintiff has, by his conduct, constituted the deputy his special agent, as in the case of *Gorham v. Gale*, decided *February* term, 1826. (a) ,

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(a) *GORHAM V. GALE*. Action for money had and received. The plaintiff proved a *fi. fa.* tested *May 18, 1822*, returnable the *1st Monday of August, 1822*, for \$376.03 in favor of the plaintiff against *J. & W. Getty*. This was delivered to *Stevens*, a deputy of the defendant, who was then sheriff of the county of *Washington*.

By the plaintiff's order, his attorney, *August 20th, 1822*, wrote to *Stevens*, the deputy, that *J. Getty* had proposed to the plaintiff to bid off the land belonging to *W. Getty*, for the amount due on the judgment, and costs ; to pay \$300 down, and the residue in 6 months. That if *Mr. Getty* paid the \$300 on the sale, or in the week following, the deputy would give him a receipt for that sum, to be credited when the residue was paid ; and, on payment of the balance, give a him certificate, that is to say, to be no sale completed until the whole amount was paid. That the terms of sale should be for cash down, and, of course, the bargain not to be completed till the whole amount should be paid. That *Gorham* did not wish to discharge the judgment, and take any new security, on the payment of \$200 ; but to have it stand in force until the whole was satisfied ; but was willing that *Getty* should have 6 months to pay the balance over \$200.

W. Getty's property sold for more than \$200 to *J. Getty*, who paid the \$200. No deed had ever been executed. On the *17th of September, 1823*, the deputy stated an account, by which it appeared that \$104 were still due on the execution, including all interest and costs.

The cause was tried *January 7th, 1824*, at the *Washington* circuit, before *WALWORTH, C. Judge* ; who directed a verdict for the plaintiff for the \$200, and interest, with leave for the defendant to move for a new trial on a case.

J. B. Gibson and *S. Stevens*, for the defendant.

W. Raleigh, for the plaintiff.

The *Supreme Court* granted a new trial, on the ground, that the plaintiff had made the deputy his private agent, to whom he must look for the money ; and the sheriff was not liable.

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It is contended by the defendant, that he acted without authority in taking the note, and discharging *Mumford* on the *ca. sa.* ; and therefore, though he may be liable for an escape, yet he cannot be charged in this action.

Such an objection comes with an ill grace from the defendant, who thus sets up his own misfeasance in his own discharge.

It is true, that the sheriff violated his duty in discharging *Mumford*, without receiving the money contained in the direction on the back of the *ca. sa.* This was so decided in *Mumford v. Armstrong*, (4 *Cowen*, 553,) where the sheriff received a draft for the money, and discharged the plaintiff. We held the taking of the draft to be unauthorized, and not a payment; and *The Bank of Orange v. Wakeman*, (1 *Cowen*, 46,) was referred to, where a similar decision was made upon the sheriff's taking a promissory note for the amount of a *fi. fa.* in his hands, and discharging it. But those cases were between the original parties; and it was held that the party for whose benefit the execution was issued, should not be prejudiced, by the improper and unauthorized acts of the officer. The question whether the officer himself would be liable, was not determined.

There is no doubt, that the plaintiff in this case, *Armstrong*, might have considered the enlargement of *Mumford* as an escape, and taken a new execution, or prosecuted the sheriff. But is he obliged to do so? May he not affirm the acts of the sheriff, consider the execution paid, and call on him for the money? Undoubtedly he may.

It is said the note is a nullity; and we are referred to several decisions where securities taken by sheriffs improperly, were held void, as taken for ease and favor.

In *Love v. Palmer*, (7 *John*. 159,) the plaintiff, a deputy sheriff, took a bond of indemnity in contemplation of an escape, which was held void both at common law and by statute, being for ease and favor, and by color of his office.

In *Richmond v. Roberts*, (7 *John*. 319,) the plaintiff was gaoler, and as such, took a bond and warrant on which

judgment was entered, and discharged the prisoner. The court set aside the judgment and warrant, on the ground that such a practice would lead to oppression. They also intimated an opinion that such a bond is against the statute, being for ease and favor.

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In *Strong v. Tompkins*, (8 John. 98,) the plaintiff, a deputy sheriff, instead of taking a bail bond on serving a *capias ad respondendum*, took a note as his indemnity, which he afterwards sued as endorsee; and was nonsuited. The court held the note void by our statute, which is a copy of the statute 23 of Henry 6.

In all these cases the security was taken by the sheriff, and prosecuted by him; and the decisions are all against the sheriff. The securities are said to be void. But it by no means follows, that he would not have been held liable as for money had and received, had he taken a note instead of a bond, in the cases of *Love v. Palmer* and *Richmond v. Roberts*.

In *England*, where the statute concerning sheriffs is the same as ours, such securities are considered valid. In *Pilkington v. Green*, (2 B. & P. 151,) the defendant being arrested on a warrant from the commissioners of excise, which was in nature of a *ca. sa.* the officer took notes, and discharged him. The notes were accepted by those interested, and prosecuted. The defendant's counsel likened it to the case of a *ca. sa.*; and argued, that if the discharge was without consideration, the notes were void. Lord *Eldon* said, "we are of opinion, that, under the circumstances of this case, the note having been accepted by those who were interested in it, has a sufficient consideration to support it." The case of *Sugars v. Brinkworth*, (4 Campb. 46,) was similar, except that the warrant was in nature of a *fi. fa.* The note taken was held a valid security. In *Bowman v. Wood*, (15 Mass. Rep. 534,) the plaintiff, a deputy sheriff, received a negotiable note as collateral security, in discharge of an execution, and was allowed to recover upon it.

According to these cases, *Porter's* note would have been recoverable by *Armstrong*, had the defendant passed it to

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him when requested to do so. The party interested in the execution, having accepted of, and ratified the acts of the sheriff, there is a sufficient consideration for the note.

The only question remaining is, whether the taking of a promissory note is to be considered the receiving of money, so as to sustain this action. The case of *Denton v. Livingston*, (9 *John.* 98,) shows that a sheriff is responsible for property sold, whether he receives the money or not ; but proves nothing as to the right of action for money had and received.

In *Wütherby v. Mann*, (11 *John.* 519,) it was held that a promissory negotiable note, given and accepted as payment of a judgment, was an extinguishment of the judgment ; being, in such case, equivalent to the payment of money.

In the case of *Beardsley v. Root*, (11 *John.* 468,) *Van Ness*, justice, in giving the opinion of the court, says, "the general rule indisputably is, that the action for money had and received, cannot be supported, unless the defendant actually has received money. It has, however, been held in the English courts, that taking negotiable paper is equivalent to the receipt of money ; and although we have never sanctioned that doctrine by an express decision, yet, in the case of *Cumming v. Hackley*, (8 *John.* 206,) the court seem to intimate their approbation of it."

In *Douglass v. Waer*, (*Anth. N. P. Rep.* 131,) *Spencer*, justice, decided, that the plaintiff having given a promissory note for the defendant's use, entitled him to recover as for money paid, though the note was not paid in fact, it having been accepted by the defendant's creditor in satisfaction of his debt. So too, in *Beardsley v. Root*, no money was in fact received ; but the defendant having discharged the plaintiff's debt, the action was held to lie. In that case, *Floyd v. Day*, (3 *Mass. Rep.* 403,) is cited with approbation ; the principle of which is, that an agent who discharges a debt of his principal, by receiving a negotiable note, becomes accountable to the latter, as for so much money received.

In these cases, the agent had discharged the debt of his principal. In the case under consideration, the taking of the note in question, did not, *per se*, discharge *Mumford*. The plaintiff might have taken another execution against him. But having subsequently ratified the act of the sheriff, by considering the transaction as a payment, and demanding the money, or the note, I apprehend his remedy against *Mumford* no longer exists. If this be so, then this case is directly within the cases referred to between principal and agent; and the plaintiff is entitled to recover.

Interest was cast from the *return day* of the execution. If the plaintiff is entitled to recover at all, he is entitled to interest from that time.

Judgment for the plaintiff.

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v.
Wilson.

BASKINS against WILSON.

ASSUMPSIT; tried at the *Steuben* circuit, *June*, 1826, before NELSON, C. Judge.

The declaration was entitled of *August* term, 1823; and contained the common money counts; to which the defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*. Replication to the last plea, that the defendant did assume, &c. within six years, &c., and issue.

To save the statute of limitations, on the ground of unexecuted process, within the six years, the plaintiff must reply, that process was sued out, and returned *non est inven-*

tus; and connect it, by continuances, with the immediate process on which the defendant was arrested. And this replication must be sustained by evidence.

It is not enough to show that process was sued out, without being delivered to the sheriff, or returned.

The continuances may be entered at any time.

An endorser is an incompetent witness for the endorsee in a suit by him against the maker, even to prove the defendant's confession of the debt, so as to take it out of the statute of limitations, after the maker's signing has been proved by another. And where the endorser deposed that he had disposed of all his interest in the note; and believed that he had not been made responsible; *held*, that this was not sufficient to do away the presumption of law that he was interested.

But, *semble*, that if he be not responsible as endorser, he would not be so far interested, by reason of an implied warranty of the genuineness of the note, as to preclude his being a witness to show the maker's confession, so as to take the note out of the statute of limitations, after the maker's signature had been proved by another.

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At the trial, the plaintiff introduced a promissory note for \$164,50, dated *August 31st*, 1816, payable 90 days after date, made by the defendant, payable to *George Minier*, or order, by whom it was endorsed. The maker's hand was then proved by *H. Wells*, Esq. and the endorsement by *J. E. Jones*.

To support the replication, the plaintiff then called *G. C. Edwards*, Esq. who testified, that he and *William B. Rochester*, Esq. were partners, as attorneys, in 1822; that on the 9th day of *October*, in that year, a *capias ad respondendum* was made out in this cause, with the *bona fide* intention of having it served; that it was taken by Mr. *Rochester* to *Allegany* county, where the defendant then resided; but he did not know that it had ever been delivered to an officer; or that it had ever been returned.

The plaintiff next offered the deposition of *Minier*, the payee and endorser, taken under a commission, for the purpose of proving an acknowledgment of the note by the defendant, within six years. In the course of this deposition, he stated that he had disposed of all his interest in the note, and was not made responsible, as he believed, on the endorsement. The deposition was, notwithstanding, objected to, and excluded, on the ground that the witness was interested.

The judge nonsuited the plaintiff, on the ground that neither branch of his proof sustained his replication.

Z. A. Leland, for the plaintiff, moved to set aside the nonsuit, and for a new trial. He said, *Minier* was competent to prove the mere acknowledgment of the defendant, after his hand-writing had been established by another witness. (*Chit. on Bills, Phil. ed.* 531, 532. 2 *Campb. Rep.* 332. 12 *East*, 38. 1 *Campb. Rep.* 407. 17 *John.* 176. 2 *East*, 458. 5 *Taunt.* 183.) If not, there was evidence of a suit commenced before the statute of limitations had attached. It is not necessary to continue the process to the time of filing the declaration. (18 *John. Rep.* 14, 494. 1 *Caines*, 69. 1 *Chit. Pl.* 554. 15 *John. Rep.* 326. 12. *id.* 430.)

H. Welles, contra. *Minier* was incompetent, by reason of interest. (15 *John.* 240. 16 *id.* 201. 2 *John. Digest*, 593, *Evidence*, pl. 280. 1 *Phil. Ev.* 53, 4.) His general assertion of not having been made responsible, does not amount to a direct and full denial of his liability as endorser. But if he was discharged in that respect, he is still liable on the implied warranty that the note was genuine. (15 *John.* 240. 16 *id.* 201.)

The plaintiff wholly failed to show the commencement of this suit within the six years. (1 *Dunl. Pr.* 57, 124, and the cases there cited. 6 *T. R.* 617.)

Curia, per SUTHERLAND, J. The title of the declaration is of *August* term, 1823. The writ issued in *October*, 1822, is not the writ, then, on which the defendant was arrested; nor does the *capias* on which he was arrested, appear to have been an alias or pluries. No connexion is shown between the two; and that issued in *October*, 1822, is totally unavailing. In order to render it availing, the plaintiff should have shown in his replication, that it had been actually returned by the sheriff, *non est inventus*, and regularly continued on the roll from term to term, down to the time of suing out the process on which the defendant was finally arrested. It is indispensable, for the purpose of saving the statute, that the writ should be returned. The continuances may be entered at any time. (1 *Dunl. Pr.* 57, 124. *Beckman v. Satterlee*, 5 *Coven*, 519, and the cases there cited.) The evidence was not admissible under the pleadings.

The only question then is, whether *Minier* was competent to prove an acknowledgment of the debt by the defendant within six years. The acknowledgment was sufficient to take the case out of the statute, if it was proved by competent evidence.

The objection on the trial to *Minier's* deposition, was on the ground of his interest generally. The only evidence to show that he is not liable as endorser, is what he himself says in his deposition; "that he has disposed of all his interest in the said note; and that he is not made responsible, as he believes, on the said endorsement." This

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appears to me altogether insufficient. The presumption of law is, that he has been regularly charged as endorser; and this presumption is rebutted only by the belief of the endorser, that he has not been made responsible. Upon what that belief is founded, does not appear. Whether he is liable or not, is a mixed question of law and fact. He may not have received actual notice of the dishonor of the note by the maker; and found his belief upon that circumstance. But if notice was actually sent to him, he is charged, although he may never have received it. The notice may, in his opinion, have been given too late; but whether it was or not, is a question of law, which he cannot be permitted to decide, for the purpose of rendering himself a competent witness. He does not pretend that the note was taken by the endorsee upon the credit of the maker only, and under an agreement not to look to him as endorser. Such was the evidence in *Herrick v. Whitney*, (15 John. 240,) and in *Shaver v. Ehle*, (16 John. 201.) He must, then, be considered as endorser, liable to pay the note, if it should not be recovered from the defendant. He had, therefore, a direct interest in producing a recovery in this suit. On this ground, he was incompetent.

If he had not been responsible as endorser, I am inclined to think that his liability upon the implied warranty of the genuineness of the note, would not have disqualified him for the purpose for which he was offered.

The genuineness of the note had been previously established, by proof of the hand writing of the maker; and although the testimony of the witness, as to the admission of the debt by the defendant, might tend to corroborate the previous testimony, it was not offered for that purpose; nor was such its natural and legal effect. The rule upon this subject, as recognized in *Herrick v. Whitney* and *Shaver v. Ehle*, has always appeared to me to be founded on considerations, extremely refined and artificial. It is, at all events, not to be extended.

The motion must be denied.

Motion denied.

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v.  
Brown.MUMFORD *against* BROWN.

ON error from the *Seneca C. P.* *Brown* sued *Mumford* before a justice, for money paid and work done, in repairing certain premises of which the parties were tenants in common. The former recovered; and the latter appealed to the C. P. where the former also recovered; on this state of facts, presented upon bill of exceptions: the parties being tenants in common of a lot, the plaintiff below made a board fence on the rear, where an old fence had rotted down. The new fence was a substantial benefit; and the lot would produce as much additional rent, as would pay for the repairs. When the plaintiff made the repairs, he was in actual possession of the lot, under a lease for one year from the defendant, of his half, at a stipulated rent. The defendant lived about 3 miles distance from the premises; and was often in the village where they lay. No express request for, assent to, or promise to pay for the repairs on the part of the defendant was proved; nor did it appear that, before making the repairs, the plaintiff had requested the defendant to make his share of them. The plaintiff claimed to recover one half the value of the repairs. The defendant moved the C. P. for a nonsuit, which they denied. Verdict and judgment for the plaintiff below.

A tenant cannot recover of his landlord, for repairs done by the former to the demised premises, unless there be a special agreement by the latter to pay for them.

Assumpsit will not lie by one tenant in common against another, for repairs to the land, tho' they be proper or necessary, without a previous request to join in the repairs made, and a refusal by the latter. Whether even then assumpsit be the proper remedy? *Quere.*

*Talcott*, (*attorney general*), for the plaintiff in error. The building of the fence was, for aught that appears, without the knowledge, and against the will of *Mumford*. Clearly he is not accountable as landlord to his tenant for these repairs. (1 *T. R.* 20. 20 *John.* 28.)

*L. F. Stevens*, *contra*. The landlord is liable for such repairs as are necessary to preserve the premises from dilapidation.

At any rate, a tenant in common is liable for such repairs to his co-tenant. (*F. N. B.* 295. *Writ de repar-*

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*tionem faciendam. id.* 378. *Writ of Contribution.* The action of *assumpsit* has taken the place of the ancient remedy. (9 *Mass. Rep.* 540.)

*Talcott*, in reply, said that no liability for repairs attached to the co-tenant till after demand and refusal.

*Curia, per SAVAGE*, Ch. J. Clearly, the defendant below was not liable as landlord. It is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them, authorizing him to do this. The tenant takes the premises for better and for worse ; and cannot involve his landlord in expense for repairs, without his consent.

It is, however, a different question, whether the defendant below was not liable as tenant in common, for such repairs as were necessary to preserve the property.

The ancient mode of proceeding, by one tenant in common against his co-tenant, who refused to repair, was by writ, *de reparatione faciendam*, a remedy which, probably, still exists. A recovery could be had by this writ only in case of refusal to repair ; and admitting that the action of *assumpsit* has superseded the ancient proceeding, should not the plaintiff below have shown a request and refusal ? In *Doane v. Badger*, (12 *Mass. Rep.* 65,) it was decided that one claiming a privilege in a well and pump, situate in the land of another, each being bound to contribute to the repairs, can have no action for repairs against him whose land the well is in, until after a request and refusal to repair. *Jackson*, J. who delivered the unanimous opinion of the court, said, that considering the parties as tenants in common, with no prescription, or special contract as to repairs, it was clear the action could not be sustained, without a request by the plaintiff to the defendant to join in making the repairs. He says the action on the case seems to be a substitute for the old writ *de reparatione faciendam*. But he adds, "If two co-tenants tacitly agree, or permit the house or its appurtenances to go to decay, neither can complain of the other, until after a request and refusal to join in making the repairs." The reason

upon which he founds this position, seems to be conclusive. It is, that, till such request and refusal, both tenants are in equal fault, one having as much reason to complain as the other.

In *Loring v. Bacon*, (4 Mass. Rep. 275,) it appeared that the plaintiff owned the upper, and the defendant the lower story of a house. The plaintiff repaired the roof, after requesting the defendant to join in the repairs; and then sued to recover the defendant's alleged proportion. The court held that the plaintiff could not recover. The parties were considered, not as tenants in common; but owners in severalty of the parts occupied by each. But the principle was recognized, that tenants in common may be compelled to repair by the writ *de reparatione facienda*; and also that if one suffer his separate property to go to decay to the injury of another, a writ may be obtained to compel him to repair it; and that after an injury sustained, an action on the case lies. That case was very different from this; and no inference can be drawn from it, affecting the question now before the court.

I know of no adjudication or principle by which one shall be compelled to pay another for services rendered without request or assent, express or implied.

The plaintiff in error is not liable on the count for money paid, because it was without his assent; nor is he liable as co-tenant, because he was not in fault, having never been requested to make the repairs. That the repairs were proper and necessary, does not alter the case.

The judgment must be reversed.

Judgment reversed.

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Oct. 1826.

Spafford  
v.  
Hood.

SPAFFORD *against* HOOD.

The penalty imposed by the latter part of the 22d section of the act for the support of common schools, (*sess. 42, ch. 161*), upon the clerks, &c. of school districts, for the nonperformance of their duties, does not extend to the defective performance, or omission of a particular act; but only to a general nonperformance of the duties of their offices.

Accordingly, it does not attach for the omission of the clerk, to warn a part of the taxable inhabitants of a school district, to attend a special meeting ordered by the trustees.

The object of this section was, to compel a *bona fide* acceptance of the offices which it enumerates.

A similar construction applies to the 5th section of the act for the assessment and collection of taxes, (*2 R. L. 512*), which imposes a penalty upon assessors. *Per SUTHERLAND, J.* delivering the opinion of the court.

Where it is the intention of the legislature to impose a penalty on an officer, for the omission of any particular duty, they use language which is clear and explicit; *e. g.* *2 R. L. 274*, imposing \$10 on overseers of highways for not warning people assessed to work, &c. *Per SUTHERLAND, J.* delivering the opinion of the court.

ON error from the C. P. of *Orleans* county. The cause came into that court by appeal from a justice's court. The action was debt, by *Spafford* against *Hood*, for \$10, the penalty mentioned in the 22d section of the act for the support of common schools, passed *April 12th*, 1819. (*Sess. 42, ch. 161, p. 187.*) The declaration was for neglect of the duties imposed on the defendant, as district clerk of school district No. 8, in the towns of *Murray* and *Clarendon*, in the county of *Orleans*.

At the trial, in the C. P., the plaintiff proved that the defendant was clerk for the district mentioned in the declaration, and that he acted as such in 1824; and that, as such clerk, he was ordered by the trustees of the district, in *December*, 1824, to call a special meeting for the *24th* of that month. That he was ordered to do this more than 5 days previous to the meeting; but that he neglected to warn and notify certain individuals, taxable inhabitants, who resided in the boundaries of the district.

The court below deciding that, to warrant a recovery of the penalty, the omission of the defendant must be shown to have been wilful and designed, evidence was given upon this point. The court also charged the jury that the omission must have been wilful and designed; and the plaintiff excepted upon this, and other points which it is not necessary to notice. Verdict and judgment for the defendant.

*L. B. Jewett*, for the plaintiff in error.

*R. Bryant, contra.*

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*Curia, per SUTHERLAND, J.* The latter part of the 22d section of the "act for the support of common schools," imposes the penalty of 10 dollars upon the clerk, trustees and collector of each school district, who shall neglect the performance of the duties of his office. This section provides, in the first place, "that every person who shall be duly chosen, or appointed to either of said offices, and shall refuse to serve therein, shall forfeit and pay the sum of \$5, &c. ; and every person, who being duly chosen or appointed as aforesaid, to serve in any such office, and having accepted thereof, or not declared his refusal to accept, shall neglect the performance of the duties of such office, shall forfeit and pay the sum of \$10 ; to be recovered, &c." The defendant was elected clerk of the school district in which he resided, and accepted the office ; and, for aught that appears, performed its duties generally in a faithful and satisfactory manner. But it, appeared, that in the month of *December*, 1824, he was directed by the trustees to call a special meeting of the district. That on such occasion, he omitted to give notice of the time and place of the meeting, to two or three of the taxable inhabitants of the district ; and that omission is the foundation of this action.

The plaintiff took several exceptions to the opinions expressed by the court below, which it is not necessary particularly to consider ; as we are clearly of opinion that it is not a case to which the penalty given by the section in question, was intended to apply.

It is apparent, that the sole object of the 22d section of this act, is to compel the individuals who may be elected, or appointed to the offices of clerk or trustees, or collector of any school district, to accept the appointment. It is accordingly provided in the first instance, that any individual who, after having been duly elected or appointed to either of those offices, *shall refuse to serve therein*, shall forfeit and pay the sum of \$5. But it was foreseen that this provision might be evaded, by a nominal acceptance

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of the offices, and an entire neglect or omission to perform any of their duties : and it was to guard against such an evasion, that the latter clause of the section was inserted. It is applicable only to cases where the acceptance of the office is colorable merely, without any *bona fide* intention, at the time of accepting it, of discharging its duties ; and not to cases where the person elected or chosen, enters upon, and performs the general duties of the office ; but is guilty in an individual instance, of a negligent, or even a wilful omission of his duty. The duties of these officers are various and minute ; some of a merely ministerial character, as calling meetings, giving notices, &c. ; others of a more important and responsible description ; and the performance of the latter is generally enforced, either by requiring security to be given, or imposing a specific penalty for the omission. Thus, by the 24th section, the collector of the district is required to give security in double the amount of the taxes, or other moneys to be collected by him : and by the 28th section, a penalty of \$25 is imposed upon the trustees, or any one of them, who shall make a false report to the commissioners of common schools for their town ; by means whereof any moneys shall be fraudulently obtained from the commissioners, or unjustly apportioned by them. And the 30th section imposes a similar penalty upon any trustee, who shall refuse or neglect to render an account of all the money received by him, or to pay over any balance which may be found in his hands. The discharge of the important duties of these officers being thus provided for, it is not reasonable to suppose that the legislature intended to impose a penalty upon them, for an omission to perform each and every subordinate act, appertaining to their offices. It is not usual with us, to enforce the performance of the duties of our officers by penalties, except where, from the nature of the duty, there is peculiar danger of malfeasance.

The 5th section of the act for the assessment and collection of taxes, (2 R. L. 512,) contains a provision very similar to that which we are now considering. It is, that if any assessor shall refuse, or, without being prevented

by sickness, neglect to perform the duties required of him by this act, he shall forfeit and pay to the people of this state the sum of \$50. There can be no doubt, I apprehend, that the neglect here spoken of and intended, is a total neglect, equivalent to a refusal to take upon himself the office ; and not the omission of a single act.

The 9th section of the act relative to the duties and privileges of towns, (2 *R. L.* 129,) contains a similar provision in relation to the town officers.

Where it is the intention of the legislature to impose a penalty on an officer for the omission of any particular duty, they use language which is clear and explicit. Thus, in relation to the overseers of highways, (2 *R. L.* 274, s. 14,) it is provided, "That every overseer of highways, who shall neglect or refuse to warn the people assessed, to work on the highways, &c., or to collect the moneys that may arise from fines or commutations, or to perform *any of the duties* and services required by the act, or which may be enjoined on him by the commissioners, &c., shall forfeit *for every such neglect or refusal*, the sum of \$10," &c. The difference in the phraseology of these acts is very striking : and, in my judgment, affords strong confirmation of the correctness of the construction we have given to the section of the school act under consideration. The judgment of the court below must be affirmed.

Judgment affirmed.

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BUTTERFIELD *against* COOPER.

ASSUMPSIT ; tried at the *Jefferson* circuit *December 24th*, 1826, before WILLIAMS, C. Judge.

The action was, to recover back about \$700, the consideration money paid by the plaintiff to the defendant, on a contract to purchase of the latter a lot of ground called the *Hawkins* lot.

be rejected as surplusage ; and that the contract covered the whole lot surveyed and set off to *Hawkins*, and upon which he entered, improving part, under a parol contract of purchase ; though it, in fact, contained 106 acres.

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An agreement was, to convey "the *Hawkins* place, containing 100 acres;" *held*, that the clause, "containing 100 acres," should

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The facts, as proved at the trial, were, that on the 10<sup>th</sup> of *March*, 1824, the plaintiff agreed to pay the consideration; and the defendant to convey at the time, and in the manner specified in certain memoranda of the agreement, drawn up and signed by the parties on that day, one of which was retained by each. There was no question that the consideration had been paid; but the parties disagreed in the construction of these memoranda in the description of parcels. The memorandum signed by the defendant, and kept by the plaintiff, mentioned these as the *Hawkins* place. That signed by the plaintiff, and kept by the defendant, mentioned them as *the Hawkins place, containing one hundred acres, lying partly opposite to H. Hilyerd's farm.*

Before entering into the agreement in question, the defendant, owning a large tract of land, had contracted verbally with one *Hawkins*, to sell him 100 acres. A surveyor went with *Hawkins* and the defendant, to locate the purchase; and they commenced on one *Conklin's* east line, on the Quaker road, and ran easterly on that road, 81 rods, where the surveyor stuck a stake. Thence they ran back from the road towards one *Parish's* land; but on account of an intervening swamp, they could not complete this, nor the other two lines. They were intended, however, to run along *Parish's* line to *Conklin's*; and thence along *Conklin's* to the place of beginning. The surveyor told the defendant, he thought these lines would include more than 100 acres. *Hawkins* took possession of the premises, and cleared as far east as the stake, and back to *Parish's* land; his whole clearing, which he occupied, amounting to thirty one acres. This purchase of *Hawkins* was called 100 acres, and *Hawkins* was not to have any more; but it, in truth, amounted to 106 acres. When the plaintiff and defendant came to arrange the draft and execution of the conveyance under their contract, the former was willing to take a conveyance of 100 acres only; but claimed to have the whole length on the road to the stake. The defendant insisted on conveying no farther east on the road, than to include 100 acres between

*Conklin's* and *Parish's* land. The whole difficulty was about the 6 acres. The plaintiff was willing that the defendant should take out 6 acres back, so as not to take any of the improved land; but the defendant claimed to take part of this. Finally, the plaintiff demanded a deed of the *Hawkins* lot, or the 106 acres, which the defendant refused to give. The plaintiff then demanded the consideration paid. The defendant did not comply with this demand. He afterwards made out a deed, excluding a part of the improvements, so as to include 100 acres only. But this was never tendered to the plaintiff.

The judge charged the jury, that the plaintiff was entitled to the whole 106 acres, as at first marked out; and they found for the plaintiff, \$740,83, damages.

A motion was now made, in behalf of the defendant, for a new trial.

*E. Fowler & M. Sterling*, for the motion.

*G. C. Sherman & D. W. Bucklin*, contra.

*Curia*, per SAVAGE, Ch. J. Taking the two memoranda together, the agreement was, that the defendant should convey "the *Hawkins* place," as expressed in the memorandum signed by the defendant. According to the memorandum signed by the plaintiff, the agreement was for the purchase of "the *Hawkins* place, containing one hundred acres." Suppose the defendant had executed a deed in the language of the agreement, "the *Hawkins* place, containing one hundred acres;" how much would the purchaser have taken? The *Hawkins* place was a piece of ground, known by that name, because *Hawkins* had occupied it, and it was set off to him by the defendant in person. I apprehend that such a conveyance would authorize the grantee to hold all that was actually laid off to *Hawkins*, as far east as the stake stuck by the surveyor in the presence of the defendant and *Hawkins*, without regard to the quantity of acres. The words, "one hundred acres," were matter of description. It seems to me similar to conveying a lot by its number, containing 600

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acres. The purchaser takes the lot, whether it contains more or less than the specified quantity. This is like the case of *Mann v. Pearson*, (2 *John. Rep.* 37,) where, in a deed of lot 74, *Lysander*, containing 600 acres, the contents were said to be matter of description merely. The court considered the number of the lot as a reference to the metes and bounds. In this case, the description of "the *Hawkins* place," referred to the actual location of the lot, as possessed by *Hawkins*.

I am of opinion the judge decided correctly ; and that a new trial should be denied.

New trial denied.

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MURRAY and MURRAY *against* JUDAH.

Demand of a check must be made of the drawee, before the holder can sue the drawer. ASSUMPSIT ; tried at the *New-York* circuit, *January 20th*, 1825, before EDWARDS, C. Judge.

No particular time for demand is fixed. It is enough that it be within a reasonable time ; and it does not lie with the drawer to object that the demand is too late, unless he has been injured by the delay.

One who has transferred a check or note, is an incompetent witness for the holder, in an action upon it, on the ground that he impliedly warrants his title and the genuineness of the paper ; but if he be discharged from his debts under the insolvent act, subsequent to the transfer, this renders him competent.

Whether he be not a competent witness, where the genuineness of the paper is first established by other evidence ; and there is no pretence that he wanted title to the paper ? *Quere.*

A warranty of title or genuineness by one who transfers negotiable paper, if it turn out to be false, is broken the instant of the transfer ; and his liability is taken away by a discharge under the insolvent act, after the transfer, though before the want of title or genuineness be detected.

The drawer of a check is not a surety for the payee, though it be lent to, or drawn for the accommodation of the latter. And, therefore, though a subsequent holder give time to the payee to make payment, he being bound to pay such holder, this will not discharge the drawer, even though such holder know the check was for the payee's accommodation. As between the drawer and the payee and subsequent holder, the drawer is the principal, and the payee the surety.

Though a check be transferred to two, as collateral security for two several debts due to them respectively, yet one alone may sue upon it, and possession by him is, *prima facie*, evidence that the other has sold his interest to him.

In an action for money paid, &c. or money had and received, by the holder of a check against the drawer, the check is, *per se*, conclusive evidence ; and the drawer cannot show in his defence, that money was not had and received by, or paid for him.

A check was transferred by the holder as collateral security for an antecedent debt. Afterwards, the drawer failing, it was appraised, and the creditor took it absolutely, at a sum less than its face, giving the holder credit at the amount of the appraisal. *Held*, that in an action by the creditor against the drawer, this circumstance could not be evidence to diminish the amount of the recovery ; that, though the creditor gave less, yet he was entitled to recover according to the face of the check.

The action was to recover the amount of a check, of which the plaintiffs were holders, drawn by the defendant on the Phœnix Bank, payable to bearer, drawn the 8th, but post dated the 15th of *May*, 1818, for \$5000. The declaration contained the common money counts only.

It appeared at the trial, that the check had been duly executed. That at the date of the check, the defendant had in the bank, a little more than \$500; and that on the 23d of *January*, 1820, his account with the bank was closed, and he drew for the balance. He had a considerable running account at the bank, and often had large balances due to him; and from *June 15th* to 18th, 1818, he had there \$5126,82; and if the check had been presented at its date, or within several months afterwards, it would have been paid. The defendant was in good credit till his failure, which was in *July*, 1819.

The defendant moved for a nonsuit, on the ground that no demand of payment was shown, by the plaintiffs, to have been made at the bank. The judge overruled the motion, and decided that the plaintiffs were entitled to recover the amount which the defendant had in the bank at the date of the check, this operating as a special assignment of that amount to any future holder of the check; and the withdrawal of the funds was money had and received for the use of the holder. The defendant excepted.

The judge refusing to declare that any future funds, deposited by the defendant in, and drawn from the bank, were, in like manner, money had and received for the holder's use, the plaintiffs excepted.

The plaintiffs then called *I. Foote* as a witness. *Foote* had, on the 10th of *May*, 1819, passed the check to the plaintiffs and one *Thomas*, as security for a debt previously due to them respectively, of more than \$1,200. But he had been discharged in 1821, under the insolvent act of *April 12th*, 1813. Proof of these facts were followed up by the production of the discharge and the proceedings to obtain it. The defendant objected that the witness was incompetent, as he might be liable, notwithstanding his



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discharge, in case the check should prove invalid or ineffectual against *Judah*. The objection was overruled, and the witness sworn. The defendant excepted.

*Foot* then testified, that on the 11th of *May*, 1818, he gave his check on the *Manhattan Company*, for \$5000, to one *Weston*, who obtained the money, in exchange for the check in question. That his check to *Weston* was a loan, upon the understanding that *Weston* should loan the witness a like sum, for the same length of time. On the day the check in question was due, (it having been post dated the 15th of *May*,) *Weston* requested the witness not to present it to the bank, which the witness agreed to. He saw *Judah* within about 6 months after the check was due; and on his (*J.'s*) request, promised not to present the check, without letting him know it. There was a general understanding between the witness and *Weston*, that the witness should not present the check. The witness also stated, that when he passed the check to the plaintiffs and *Thomas*, he did not know that it was a lent check. That the defendant promised the witness, that the check should be paid, both before and after the transfer, and after the defendant knew of the transfer to the plaintiffs and *Thomas*. After the defendant's failure, and he believed after the commencement of this suit, the witness went to the *Phoenix* bank, to inquire if there were any funds there; and had the check with him, having procured it from Mr. *Murray* for the purpose.

On cross-examination, he admitted, that before he passed the check, he heard both from *Weston* and the defendant, that the check had been loaned to *Weston* for his accommodation. Another check of the defendant for \$5000, dated in *April*, 1818, and negotiated by *Weston* with the witness, had also, at the same time, been transferred to the plaintiffs and *Thomas*; and when the defendant conversed with the witness, he spoke of both checks. On the 29th of *February*, 1820, the witness received a deed from *Weston* of land in *Madison* county, and, with the plaintiffs' and *Thomas*' consent, gave up the check dated in *April*, to be cancelled. The land was conveyed for their

benefit. He, at the same time, with the consent of the plaintiffs and *Thomas*, and as part of the arrangement, agreed, under seal with *Weston*, that on his paying \$2,500, with interest thereon, after the lapse of six months, it should be in full of all claims which the witness then had against *Weston*; and that he would give up to *Weston* the check in question. This agreement was produced on the trial. The witness said he understood that if the \$2,500 was not paid in 6 months, the check would be good for the whole amount.

The witness farther testified, that on the 31st day of *March*, 1821, the check in question, with certain other property, were appraised at \$1,250, by agreement between the witness and the plaintiffs and *Thomas*; and that sum placed absolutely to the credit of the witness. That the plaintiffs and *Thomas* then became petitioning creditors for the witness' discharge, to the amount of the balance due after such credit.

He farther stated that he did not inform the plaintiffs, at the time of his passing the check, that the money was raised for *Weston*, or the check for his accommodation.

The defendant now again moved for a nonsuit, on the ground that *Thomas* should have been a party plaintiff with the *Murrays*; and that the check having been lent to *Weston* by the defendant, the general money counts would not reach the case. The judge overruled the motion, on the grounds that the possession of the check by the plaintiffs was, *prima facie*, evidence that *Thomas* had transferred it to them; and that the plaintiffs might recover on the money counts, in the same manner as if they had declared upon the check. The defendant excepted on both points.

*Weston*, who had been discharged under the insolvent act, was then sworn for the defendant; and stated that he borrowed the check in question, on the 11th of *May*, 1818, it being post dated the 15th. The check was borrowed for witness' exclusive use, and he so told *Foote* when he received it. *Judah* refused to consent to any arrange-

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ment, except on the basis of giving up both checks, which the witness repeatedly told *Foot*e.

The defendant then offered to prove, by this witness, that the deed of conveyance to *Foot*e was in payment of both checks. To this the plaintiffs objected; but the evidence was received, and the plaintiffs excepted.

The witness then swore, that the check in question was liquidated at \$2,500; and that it was agreed that the residue of the check should be paid by the conveyance; and it was paid accordingly. On cross-examination, however, he admitted the whole agreement was contained in the writings.

Another witness for the defendant testified to the like effect.

*Foot*e being again called, after a recess of the court, stated that, on further reflection, he recollected that he had obtained the check in question from Mr. *Murray*; and presented it, before the commencement of this suit.

Considerable contradictory evidence was then given upon the question, whether the check had been originally given on an usurious consideration.

The judge charged that the legal presumption was, that the money for which the check was given, had been paid for the defendant's use, or had and received by him; and that in this case he could not be permitted to show the contrary. That to constitute usury, there must have been a corrupt agreement to pay more than legal interest for the check; and that both parties must have agreed to the corruption. That the plaintiffs were entitled to recover on the common money counts. That the defendant could not be considered in the light of a surety, though the check was loaned to *Weston*; and though *Foot*e knew this when he took it. That the submission to arbitration, between the plaintiffs, *Thomas* and *Foot*e, and the award thereon, were no obstacle to the plaintiffs' recovering the same amount as if the award had not been made. That no demand to fulfil the agreement concerning the check made in *February*, 1820, was necessary previous to the commencement of this suit. The defendant excepted upon

all the above points in the charge. The judge also charged, that the agreement of *February*, 1820, was no bar to the plaintiffs' recovery; and left it to the jury to pass upon the contradictory evidence concerning the usury.

Verdict for the plaintiffs, for \$3207,29.

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*J. O. Hoffman*, for the defendant, moved for a new trial. He said the plaintiffs ought to have been nonsuited at the close of their testimony, no presentation of the check having been proved. (3 *John. Cas.* 5, 260. 12 *East*, 170. 7 *East*, 359. 15 *East*, 220.) By the authorities cited, it will be seen that a check is considered a bill of exchange; and that both demand and refusal of payment, and notice of these to the drawer, are necessary, before a suit can be sustained against him, unless there be a total want of funds in the hands of the drawee.

*Foote* was not a competent witness. (1 *Phil. Ev.* 47, 53. 6 *John.* 5. 11 *John.* 57.) He was a warrantor of the genuineness and validity of the check in the hands of the plaintiffs; who, on failing in this suit, may go against him; and the very record here will be evidence. The discharge does not destroy his interest; for his liability was contingent at the time when that discharge was obtained.

Any defence which might have been made against *Foote*, is equally available against the present plaintiffs; and any defence of *Weston*, is equally the right of the defendant.

If the plaintiffs are entitled to recover at all, it can only be to the amount which they paid for the check.

*Thomas* should have been a party. The suit is not on the check; but for money had and received; and the check was transferred for the joint benefit of the plaintiffs and *Thomas*.

The check was an accommodation check, and so known to be. The defendant, then, was only a surety; and the extension of credit released his responsibility. The defendant never assented to the giving of credit.

The plaintiffs having taken the check merely as collateral security, cannot be deemed *bona fide* holders in the fair course of trade. (5 *John. Ch. Rep.* 54.)

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*H. D. & R. Sedgwick*, contra. The general counts are always sufficient against any party to negotiable paper. (12 *John.* 90.) And the holder of such paper is always, *prima facie*, the owner. (11 *John.* 52. 3 *Cowen*, 260.) The defendant signed the check as a principal; and this act estops him from now setting up the fact, that he was surety merely; especially as to third persons, holding the security which he has put afloat. (17 *John.* 169.) But he has not shown himself to be a surety. If he is to be regarded as the drawer for the accommodation of *Weston*, the giving of time will not discharge him. This was directly decided in *Fentum v. Pocock*, (5 *Taunt.* 192.) True, that case was decided of an exceptor for accommodation; but the principle is the same. *Carstairs v. Rolleston*, (*id.* 551,) was a still stronger case. There, a maker of a note for the endorser's accommodation, was held not to be discharged by a release of the endorser. The rights of parties must always be taken as they appear upon the written contract they have formed.

All *Foot's* liability, as warrantor, or otherwise, was gone by the discharge.

*Curia*, per SUTHERLAND, J. The first point, made on the part of the defendant is, that the motion for a nonsuit ought to have been granted; no demand of payment of the check at the bank having been proved.

It is a sufficient answer to this point, that a demand was subsequently proved. That such demand was necessary to entitle the plaintiffs to recover from the drawer, is well established. A check is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay money; but it is an undertaking on his part, that the drawee shall accept and pay; and the drawer is answerable, only in the event of the failure of the drawee to pay. As a general rule, therefore, a check is not due from the drawer, until payment has been demanded from the drawee, and refused by him. As between the holder of a check, and an endorser, or third person, payment must be demanded within a reasonable time. But as between the holder, and the maker or drawer, a demand at any time

before suit brought is sufficient, unless it appear that the drawee has failed, or the drawer has, in some other manner, sustained injury by the delay. These principles are recognized and established by this court, in *Cruger v. Armstrong*, (3 John. Cas. 5,) and *Conroy v. Warren*, (*id.* 259.)

2. *Foote* was a competent witness. The regularity and validity of his discharge as an insolvent, were not questioned. That discharge took place in 1821, and he passed the check in question to the plaintiffs in 1819. The objection seems to be, that *Foote* was responsible upon the implied warranty of the genuineness of the check, and of his own title to it; which, it has repeatedly been held, accompanies the transfer of all negotiable paper. (*Herrick v. Whitney*, 15 John. 240. *Shaver v. Ehle*, 16 John. 201. 6 John. 5.) But I am inclined to think, that any cause of action arising from the forgery of the check, if it should prove to be forged, must be considered as having accrued to the plaintiffs at the time when they received the check, and not when the forgery might be detected. *Utica Bank v. Childs*, (6 Cowen, 238.) If this is so, then the discharge terminated all interest on the part of *Foote*.

But it is to be remarked, that *Foote* was not called to prove the execution of the note. That had been previously established; and, in this respect, the case is distinguishable from those of *Herrick v. Whitney*, and *Shaver v. Ehle*; where the witnesses were called to prove the execution of the instruments which they had transferred, and, by implication of law, warranted. The principle itself is a strictly technical one, and not to be extended to cases which do not fall within the reason on which it has been adopted. I am aware of the general rule, that where a witness has a direct interest in the event of a cause, he cannot be admitted to testify as to any matter on which the jury are to pass, in favor of such interest. (*Butler v. Warren*, 11 John. 57.) But it appears to me to be worthy of consideration, whether the class of cases which we are now considering, ought not to be considered an exception to this rule; and whether a party who has transferred a negotiable instru-

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ment, after its execution and genuineness have been established, and there is no pretence that he had not a right to transfer it, ought not to be considered a competent witness for every other purpose. (*Williams v. Matthews*, 3 Cowen, 252.) I do not, however, intend to put the competency of the witness on that ground; but on the ground that his discharge terminated his interest.

3. It is contended, that *Foote* knew this to be an accommodation check when he took it; that the defendant, therefore, stands in the light of a surety, and is discharged by the extension of credit given to *Weston*; and by the arrangement of the 29th of February, 1820, made between him and *Foote*. The judge decided that it was immaterial whether *Foote* knew it to be an accommodation check, or not. If he did, it would not entitle *Judah* to the privilege of a surety.

The acceptor of a bill of exchange, is undoubtedly the principal debtor, and the drawer the surety, though it be accepted without consideration, and for the sole accommodation of the drawer; and nothing will discharge the acceptor but payment or a release. Lord *Ellenborough* certainly fell into an error, when he held a contrary doctrine in *Laxton v. Peat*, (2 Campb. 185,) and *Collott v. Hall* (3 Campb. 281.) These cases were subsequently overruled by *Gibbs, J.* in *Kerrison v. Cooke*, (3 Campb. 362,) and *Mansfield, Ch. J.* in *Fentum v. Pocock*, (5 Taunt. 192,) *Carstairs v. Rolleston*, (5 Taunt. 551.)

But here the drawer complains that time was given to the drawee, but to *Weston*, the payee of the bill. That was an act by which the defendant could not be injured; for he could never have a right of action on this check against *Weston*. I know no case in which it has ever been held, that giving time to the payee discharges the drawer, even of an accommodation bill, will discharge the drawer. As between the drawer, the payee and the acceptor, the drawer is unquestionably the principal, the payee the surety. (*Claridge v. Dalton*, 4 M. & C. 232, 3, per *Bayley, J.* And see *Seymour v. J.*

*John*. 169.) The opinion of the judge, therefore, upon this point was correct.

4. The judge was correct in holding that the possession of the check by the plaintiffs, was evidence that *Thomas* had transferred to them whatever interest he had in it. The check was also evidence of money had and received by the drawer to the use of the holder, and of money paid by the holder to the use of the maker. Both these points are fully considered and settled in *Pierce v. Crafts*, (12 *John*. 90.)

5. The award as to the value of the check between the plaintiffs and *Foot*e, did not affect their right to recover against the defendant. It was merely a mode of ascertaining its value, for the purpose of enabling the plaintiffs to become petitioners for *Foot*e, for the balance. It was a transaction with which the defendant has no concern. It was not an agreement on the part of the plaintiffs to collect no more than the amount at which the check was appraised, from *Judah*. It was merely evidence satisfactory for the object in view; that that was the whole amount which probably could be collected.

From the amount of the verdict, I presume the plaintiffs recovered upon the basis that, by the arrangement of the 29th of February, 1820, \$2,500 of the check were absolutely paid. It is unnecessary, therefore, to consider whether the parol evidence in relation to that settlement was properly admitted, as the defendant has had the benefit of it, and the plaintiffs do not ask for a new trial.

On the whole, I think the motion for a new trial must be denied.

New trial denied.

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H. DUBOIS *against* J. DUBOIS.

Debt lies on the decree of a surrogate, for the payment of money.

Such a decree against an executor for the payment of a legacy, changes the character of the claim into one against the defendant personally.

Hence, in an action of debt on the decree, by the legatee against the executor, the former may declare against, and charge the latter in his own right; and no security need be filed pursuant to the statute, (1 R. L. 314, 15, s. 19.)

And the latter may set off

a demand due to him, in his own right, from the plaintiff in his own right.

The surrogate has no authority, as agent for a party, to receive money which he has decreed that another should pay to the party.

Therefore, where the surrogate decreed that A. should pay to B. a sum of money; and A. laid it down on the surrogate's table, who took out a part; and the residue was attached by a constable under process in favor of A. against B.; *held*, that this was not such a payment as would vest the money specifically in B.; and that, therefore, it was not the subject of a levy on an attachment against him.

*Held*, that it was like money collected on execution by an officer, which cannot be levied on by process against the one at whose suit it was collected.

*Held*, also, that the surrogate, having no authority to receive the money, the payment did not satisfy the decree; but an action would still lie upon it.

In debt, on the decree of a surrogate against the defendant, requiring him to pay a legacy, such decree is, in itself, evidence that there was a will; and that the defendant was executor; and, therefore, neither of these facts need be shown by the plaintiff on the trial.

DEBT on the decree of a surrogate; tried the *Saratoga* circuit, *June 8th*, 1824, before NELSON, C. Judge.

The declaration was, that on the 9th day of *April*, 1823, the plaintiff, by the consideration, judgment, order and decree of *George Palmer*, Esq. surrogate of the county of *Saratoga*, upon and for a certain subject matter within the jurisdiction of the surrogate's court of that county, recovered against the defendant \$101,77, for and on account of a certain legacy bequeathed to the plaintiff by the last will and testament of *G. Dubois*, &c. Plea, *nil debet*; with notice of setting off a claim due from the plaintiff in his own right, to the defendant in his own right.

At the trial, the plaintiff proved a decree, reciting that the plaintiff and defendant were acting co-executors of *G. Dubois*, who had bequeathed a legacy to the plaintiff of \$250; which decree ordered that the balance of \$101,77 unpaid, should be paid by the defendant to the plaintiff, on the ground that assets had come to the hands of the former for that purpose. \$23,61 were paid upon the decree, leaving still due \$85,45, with interest.

The defendant then moved for a nonsuit; 1. because the defendant was not named as executor; 2. because the surrogate was not shown to have had jurisdiction; 3. because no security to refund was filed; 4. because no will was proved showing the defendant to have been executor; 5.

if he was proved to be executor, this was a variance from the declaration, which charged him in his own right ; 6. that debt would not lie ; 7. that no jurisdiction was shown by the declaration.

The motion being overruled,

The defendant then proved, that he put the money due on the decree, upon the table of the surrogate ; but after the surrogate had taken out \$23,61, the defendant caused a constable to take the residue on two attachments issued by a justice of the peace, in favor of the defendant, against the plaintiff, for debts due from the plaintiff, to the defendant. He also offered to prove that the plaintiff was indebted to him, in his own right, on promissory notes to an amount exceeding the balance due upon the decree, and to set off this demand. On objection, the judge overruled the evidence of set-off, on the ground that the suit was against the defendant as executor.

Verdict for the plaintiff, subject to the opinion of this court.

*J. L. Viele*, for the plaintiff, cited 3 *Caines*, 22 ; 1 *Campb.* 253 ; 17 *John.* 68, 301 ; 1 *Esp. Dig.* 78 ; 6 *Bac. Abr.* 136, *Set-off*, (C) ; 1 *Wash. Rep.* 79 ; 1 *Hen. & Munf.* 176 ; *Mont. on Set-off*, 13, 19 ; 2 *John. Rep.* 155 ; 1 *R. L.* 314.

He suggested that, if the court should be against the plaintiff on the question of set-off, there should be a new trial ; as there was other matter of defence against the set-off, not appearing in the case.

*E. Cowen*, contra, cited 1 *R. L.* 314, 15, s. 19 ; 5 *Serg. & Rawle*, 468 ; 18 *John.* 122 ; 1 *Vern.* 93 ; 1 *Atk.* 491 ; 6 *Munf.* 157, and the cases there cited ; 2 *John.* 243 ; *Swinb.* 621, part 4, s. 20, 7th ed. ; *Toll.* 282, 3, old ed. ; *id.* 230.

*Curia*, per SAVAGE, Ch. J. The objections to the proceedings before the surrogate, came too late. They should have been taken before the surrogate. His decree sets out the proper citation and proceedings at length ; and

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shows a case in which he had jurisdiction. By the statute, (1 R. L. 448, s. 11, ) he is "to hear and determine all cases touching any legacy, or bequest in any last will and testament, payable, or coming out of the personal estate of the testator; and to decree and compel payment thereof; saving to every one the right of appeal."

The principal question raised is, whether debt will lie. On this point, we are without any direct authority. The general rule is, that this form of action is proper for any debt of record, or by specialty, or any sum certain. It has been decided, that debt lies upon a decree for the payment of money, made by a court of chancery of another state; (*Post v. Neafie*, 3 *Caines*, 22;) and no doubt the action will lie upon such a decree in our domestic courts of equity. The decree of the surrogate, unappealed from, is conclusive; and determines forever the rights of the parties. It may be enforced by imprisonment; and is certainly evidence of a debt due. Whether a surrogate's court is a court of record, need not be decided. It has often been said that a court of chancery is not a court of record. It is sufficient that a decree in either court, unappealed from, is final. Debt will lie.

It was also objected, that the declaration does not describe the defendant as executor; but the proceedings before the surrogate were against him in that capacity. It is true the suit was for a legacy. But the surrogate, we must intend, had the proper evidence to justify a decree, whereby the defendant was to be made personally liable for a demand, which previously existed against him in his representative capacity only. By the decree, it became a personal matter. The judgment in this suit cannot be of the goods of the testator. Execution must go against the defendant personally, as for his private debt. I infer, therefore, that the character of the claim is changed by the decree: so that in prosecuting upon it, there can be no necessity to describe the defendant as an executor.

Other questions, however, arise out of the case made out and offered to be made out, on the part of the defendant.

1. Ought not the set-off to have been allowed? 2. Had

not the officer a right to levy on the money? And 3. was not the payment of the money a discharge of the defendant?

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Without discussing these questions at much length, it seems to me, that the payment of the money into court was no compliance with the decree; which was, that the defendant should pay it to the plaintiff. If the payment into court was not a discharge, it seems to follow, that the levy by the constable was void. We have decided that a levy upon money collected by, and in the hands of an officer on execution, was not a levy upon the goods and chattels of the person for whom it was collected; because the identical pieces of money collected, are not necessarily to be paid over to him. The money is not strictly his, till actually paid over. Until that be done, his right is a chose in action. If, therefore, the surrogate had received the money for the plaintiff, it would not vest specifically in him, till paid over to him or his authorized agent.

But if I am right in supposing that the defendant became personally liable by virtue of the decree, then it follows that the set-off was a good defence; and should have been received.

A new trial must, therefore, be awarded, as it is suggested that the plaintiff can rebut the set-off; the costs to abide the event.

New trial granted.

JACQUES and OTHERS, assignees of Bussing, an insolvent debtor, *against* MARQUAND.

ASSUMPSIT; tried at the *New-York* circuit, *February 5th* and *6th*, 1824, before EDWARDS, C. Judge.

An insolvent  
debtor, who  
has released

all claim to a surplus, is a competent witness for his assignees.

A partner, who holds money in his individual right, in trust for another, cannot subject the firm to an action for the money, by applying it to the use of the firm, without the knowledge or privity of the other member or members of his firm. Otherwise, where it is applied with their knowledge or privity.

Where a partner borrows money on his individual credit, and afterwards applies it to the payment of partnership debts, or lends it to the firm, this does not make the original lender a creditor of the firm.

But where a partner borrows money generally, without saying for whom, the fact of its being used in the business of the partnership, is, *prima facie*, evidence to sustain an action against the firm.

An insolvent discharge, under the act of 1813, is constitutional as to debts contracted after the act.

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The declaration contained the common money counts only, laying a promise by the defendant to *Bussing*, the insolvent ; and also to his assignees, under the act for giving relief in cases of insolvency.

Plea in abatement, that the promises laid, if any, were made by the defendant and one *Cornelius Paulding*, jointly, &c. and issue.

The plaintiffs, at the trial, offered *Bussing* as a witness, who had released all his interest in his estate assigned.

The defendant objected, that the plaintiffs were first bound to prove the assignment, before they could proceed. This objection was overruled, on the ground that the plea admitted the assignment. The defendant then objected to the competency of *Bussing*, on the ground that his discharge, which was under the act of 1813, was void by the constitution of the United States ; and he is still liable, therefore, to pay his debts. He stated on his *voire dire*, that all the debts which he owed, had been contracted since the passage of the act under which he was discharged ; and the judge admitted him to testify.

The plaintiff then produced an instrument in writing, dated *December 20th*, 1816, signed by the defendant alone, certifying that on the *12th of April*, 1814, one *Crump*, on the recommendation, and through the agency of the defendant, borrowed and received of *Bussing*, 200 shares of the capital stock of the *New-York Manufacturing Company*, which the defendant engaged to have returned and reconveyed to *Bussing*, within 30 days from the time of the loan ; that default having been made in the return and reconveyance, *Crump*, at or about the expiration of the 30 days, placed in the defendant's hands sufficient property to indemnify *Bussing*, the proceeds of which, the defendant was to have applied to that object ; but that he had converted the property into cash, and appropriated the proceeds to the use and business of the firm of *Marquand and Paulding*. That there was, at the date, due to *Bussing* on the account aforesaid, \$7763,89. (Signed,) *Isaac Marquand*.

Bussing swore that this certificate was given to him by the defendant, and signed by his own proper hand and name.

The defendant then moved for a nonsuit, on the ground that the certificate was no evidence of money for the sole use of *Bussing*, or his assignees. The judge overruled the motion.

The parties then went into further evidence, upon the question, whether the transaction out of which the above certificate arose, was one of *Marquand* and *Paulding*, the latter of whom was the *Cornelius Paulding* mentioned in the plea; or whether it was an individual concern of the defendant. This evidence is sufficiently stated in the opinion of the court.

Bussing had, by mistake, as he swore, in his proceedings to obtain his discharge, inventoried the debt in question as due from the firm of *Marquand* and *Paulding*.

The judge charged the jury, that notwithstanding the debt being so inventoried, still, if it was in fact due from the defendant alone, the plaintiffs were entitled to recover; and that even if the proceeds of the property in question were originally received by *Marquand* and *Paulding*, and applied to their use, still if the property was assigned for the satisfaction of *Bussing's* claim against *Marquand*, the plaintiffs were entitled to recover from *Marquand* solely.

The defendant excepted to this charge, and the jury found for the plaintiffs, \$11,656,76.

The parties made a case, agreeing that it might be turned by either, into a special verdict, or bill of exceptions, so far as respects the exceptions to the opinions and charge of the judge.

A motion was now made for a new trial, on behalf of the defendant, on three grounds; 1. That *Bussing* was not a competent witness; 2. That the defendant never was individually responsible; but that *Marquand* and *Paulding* were liable; 3. That the charge of the judge was incorrect.

H. D. and R. Sedgwick for the motion, cited 15 *Mass. Rep.* 75, 331.

G. Griffin, contra, cited 1 *Mont. on Partn.* 198, 9. *Gow on Partn.* 344, 348.

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of the *New-York Manufacturing Company*. *Crump* gave the following note, for the 200 shares: "Within 30 days from date, I promise to transfer to Mr. *Isaac Marquand*, or order, two hundred shares of *N. York Manufacturing Company* stock, for the same number transferred to me by Mr. *Abm. Bussing*.
Reuben Crump."

New-York, 12th April, 1814."

Endorsed thus: "Transfer the within shares to Mr. *Abm. Bussing*.
Isaac Marquand."

Crump having failed to pay this note, at or about the time when it fell due, gave *Marquand* an order for a quantity of cotton, sufficient to pay it. He acknowledges that he received it for that purpose, realized the money, and applied it to the use and business of the firm of *Marquand and Paulding*. The order for the cotton was in favor of *Marquand and Paulding*. It was sent to auction in their names, sold on their account, and the proceeds applied to their benefit. But it was all done by *Marquand*, and under his exclusive direction; *Paulding* being in *New-Orleans*, and knowing nothing of the transaction. The question is, whether *Marquand* is individually responsible for the amount, which he acknowledges has been received for the benefit of *Bussing*; or whether the action should have been brought against the firm of *Marquand and Paulding*.

There can be no doubt, that in the origin of this transaction, when *Marquand* became security to *Bussing* for the return of the stock borrowed by *Crump*, he acted in his individual capacity, and not on behalf of the firm. *Crump's* note was payable to him individually; and by him individually endorsed or transferred to *Bussing*. If an action could have been sustained at all upon this guaranty, it must undoubtedly have been brought against *Marquand* individually, and not against the firm. *Crump* testifies that when he received the transfer of the stock from *Bussing*, the defendant alone became security for the transfer of it; and that the giving of such security, was the individual transaction of the defendant. *Bussing* also testified that he considered the transaction as with *Marquand*, the defendant, and not with *Marquand and Paulding*.

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Every presumption, therefore, is in favor of the supposition that the cotton which *Crump* delivered to *Marquand* in trust for *Bussing*, and by way of indemnity against his guaranty of the delivery of the stock, was delivered to him in the same character in which his responsibility was incurred. It must be borne in mind, that the order for the cotton, though in favor of the firm of *Marquand* and *Paulding*, was, in fact, delivered to *Marquand*, who was the sole partner in *New-York*. *Marquand* alone directed it to be sold, and he alone, in fact, received the proceeds. If he applied them to the purposes of the firm, which he seems to have done, it was without the knowledge or privity of his co-partner. It is, then, the case of one partner being a trustee, bringing trust money into the firm, without a knowledge or privity on the part of his co-partner, of its being trust money; and it has been repeatedly held, in such cases, that it does not create a joint debt on the part of the firm, which can be proved against their joint estate. For, although the partner abuses his trust, and advances the money to the partnership, it will not raise a contract between the firm and the *cestui que trust*, nor convert the innocent partners into implied trustees. In *Ex parte Apsey*, (3 Bro. Ch. Cas. 265,) the case was this: *Edward Allen*, of the firm of *Edward* and *James Allen*, was assignee, together with the petitioner, *Apsey*, under a commission of bankruptcy, issued against one *William Tory*. As such assignee, he received between 4 and 500 hundred pounds, belonging to the estate, and applied it in discharging the debts, and in other purposes of the firm. The *Allens* afterwards became bankrupts, and *Apsey*, the co-assignee of *Edward Allen*, petitioned the chancellor, (on appeal from the decision of the commissioners,) for leave to prove the sum received by his co-assignee, and applied to the payment of the partnership debts, under the joint commission against the partnership. But lord chancellor *Thurlow* refused the petition; and remarked: "here one, by abusing his trust, advances trust money to the partnership; that will not raise a contract between the partnership, and the per-

son whose money it is." But where the application of the trust money to the purposes of the firm, is made with the knowledge and privity of the other partners, they are all jointly liable. (*Smith v. Jameson*, 5 T. R. 601. *Boardman v. Mosman*, 1 Bro. Ch. Cas. 68. *Ex parte Clowes*, 2 id. 595. *Ex parte Watson*, 2 Ves. & Bea. 414. 3 Bro. Ch. Cas. 112.)

Where one partner borrows money on his individual credit, and afterwards applies it to the payment of partnership debts, or loans it to the firm, it does not entitle the original lender to consider himself a creditor of the firm, and to enforce payment against them. (*Ex parte Hunter*, 1 Aik. 223. *Parkin v. Carruthers*, 3 Esp. Rep. 250, per *Le Blanc, J.*)

Where one of a firm borrows money, the fact of its being used in the business of the partnership, is, *prima facie*, evidence that the debt is joint, where no express separate contract was made with the individual partner. (8 Ves. 540. *Gow on Partn.* 343 to 349.)

I do not consider this case as at all varied by the circumstance, that the order for the cotton was drawn by *Crump* in the favor of the firm, instead of *Marquand* alone. The consideration for the order, the whole transaction out of which it grew, was an individual one, on the part of *Marquand*, in which he did not profess, and, indeed, had no authority to act for the firm: and it is worthy of remark, that it is *Marquand* himself, who denies his individual responsibility; and not the partnership, seeking to get rid of a claim which might, with some plausibility, have been preferred against them.

The application of the cases cited by the defendant's counsel, from 15 *Mass. Rep.* 75 and 331, is not perceived. In those cases the question was, whether *Gore* was liable as one of the firm of *Gore and Grafton*, in an action for money had and received under the following circumstances: They were general partners; and *Grafton* made a note in the partnership name, payable to *Thomas Cushing*, or order; and forged the endorsement of *Cushing*, and raised money upon it. The endorsee brought an ac-

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tion on the note, the declaration also containing the general counts. The court held that he was entitled to recover under the general counts, though there was no evidence that the money was actually applied to the purposes of the firm; because *Grafton* had an authority to raise money upon the credit of the house. *Gore* had reposed that confidence in him, and ought to suffer the consequences.

The exceptions to the charge of the judge are not well taken; and the motion for a new trial must be denied.

New trial denied.

WELCH against HICKS.

Where a ship is disabled from prosecuting her voyage by the perils of the sea, and puts into an intermediate port, and the goods are received there by their owner, he is liable for freight *pro rata itineris*.

But in such a case, where the master, without sufficient cause, refuses to repair his ship

and send on the goods, and to procure other vessels for the purpose, the owner may immediately demand his goods; and shall be discharged from freight, both full and *pro rata*.

To entitle to *pro rata* freight, the acceptance must be voluntary.

And where the master having thus put into an intermediate port, at first refused to repair and proceed, and to procure other vessels and send on the goods, though one might have been done; and the owner negotiated several days with him, in order to induce him to do the one or the other; and, at last, the master made an offer to repair and proceed, under circumstances calculated to excite doubt of his sincerity; whereupon, the owner demanded and received the goods, and transported them in vessels in his own procuring; in an action for freight; held, that it should have been left to the jury to say whether the proposition to repair, &c. was made *bona fide*; and whether the acceptance was voluntary, so as to entitle the ship owner to *pro rata* freight.

ASSUMPSIT for freight of the ship *Romeo*, from *Petersburgh* in *Russia*, to *Princetown* in *Massachusetts*; tried at the *New-York* circuit, *April 12th*, 1824, before *EDWARDS*, C. Judge.

The declaration stated, that the plaintiff, the owner of the ship, received goods on board at *St. Petersburg*, consigned to the defendant at *New-York*; but the ship was forced by the violence of winds and tempests, to put into *Princetown*, on her voyage to *New-York*, where the defendant elected to receive the goods, and did receive them, and release the plaintiff from his obligation to transport them to *New-York*. It contained counts adapted both to full and *pro rata* freight.

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At the trial, the plaintiff proved the shipment of the goods on certain freight, mentioned in the bill of lading, to be paid by the defendant on delivery of the goods at *New-York*; that on her voyage, the vessel put into *Princetown*, for the cause alleged; where the defendant accepted the goods; and the only question at the trial was, whether the acceptance was made under such circumstances as would legally subject the defendant to the payment of freight.

On this point, the proof was, that the defendant, on learning that the ship had put into *Princetown* in distress, despatched *Laban Gardner*, (who was sworn as a witness for the defendant on the trial,) as his agent, with full powers in relation to the goods. *Gardner* arrived at *Princetown*, *December 15th*, 1820. The vessel was lying there, unable to prosecute the voyage in question, without being repaired. She was capable, in his opinion, of being taken to *Boston*, distant from 12 to 15 leagues, where she might have been repaired in a fortnight, at a moderate expense, so as to have taken on the goods to *New-York*. The master refused to repair, or procure other vessels to forward the goods, till he heard from his owner; and refused to deliver the goods unless *Gardner* would pay full freight. *Gardner* inquired, and found that other vessels could be engaged at *Princetown* to forward the goods, and informed the master; but he refused to employ them. Things remained in this situation till the *5th* of *January* ensuing; the master, on repeated requests, refusing to take measures for forwarding the goods, or to deliver them free of freight. About the *21st* of *December*, the master said he had received orders to discharge the crew; and did accordingly discharge them, between that time and the *1st* of *January*. The harbor became obstructed by ice in about a fortnight after *Gardner* reached *Princetown*. On the *4th* of *January*, he applied, and repeated his requests to the master, who required time to answer till the next morning; when he told *Gardner* that he intended to repair the vessel at *Princetown*. *Gardner* swore that he believed him insincere in that remark, from the difficulty of making the repairs there; and that, at all events, the repairs

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could not then be made in a reasonable time. The goods were in a perishable condition. The master still refused, for some time, to forward the goods. An agreement was made that they should be delivered to the agent, on his order upon his principal for freight, according to the tenor of the bill of lading. Afterwards, they were delivered unconditionally; and *Gardner* received and forwarded them to *New-York*, in vessels of his own procuring.

The defendant also offered to prove that the money necessarily expended in freight from *Princetown* to *New-York*, exceeded the whole stipulated freight from *Petersburgh* to *New-York*. This evidence was overruled.

The judge charged, that if a vessel, laden with goods on freight, meets with a disaster in the course of her voyage, and puts into an intermediate port; and the owner of the goods receives them there, he becomes liable to pay a *pro rata* freight, and that the defendant was liable in this case to pay *pro rata* freight, unless he could show an express and positive agreement, on the part of the master, to waive and discharge all claim to freight. That the law necessarily implied an agreement to pay freight, from the act of receiving the goods; and this, notwithstanding the ability of the master to repair in a reasonable time, or send on the goods in other vessels, and his refusal, on request, to do either. That the remedy of the owner of the goods would be to abandon the goods, and bring his action for damages against the master or owner of the vessel; and in every case, under any circumstances, the owner of the goods becomes liable at all events, by the act of accepting them alone, at the port of distress, to pay a *pro rata* freight; unless he can show an express and positive agreement to the contrary. He left it to the jury to say, whether the proof established such an agreement.

Verdict for the plaintiff for \$2526,67, damages.

The defendant excepted to the above opinion and charge; and a motion, founded on the bill of exceptions, was now made, in his behalf, for a new trial.

G. Griffin, for the defendant. A *pro rata* freight is due only where the acceptance of the goods is voluntary. It

must be purely a matter of election with the owner ; in order to which, there must be volition. The doctrine of *pro rata* freight is of modern origin. The general rule is, that, to entitle to freight, the goods must be delivered at the port of destination. The charter party never provides for freight short of this. There must then be such an acceptance as lays the foundation of a new promise. The action for *pro rata* freight is always *assumpsit*. These views will be found fully supported by the cases. (*Luke v. Lyde*, 2 Burr. 885. 1 W. Bl. 190, S. C. *Cook v. Jennings*, 7 T. R. 377, 381. *Mulloy v. Backer*, 5 East, 316. *Liddard v. Lopes*, 10 id. 526. *Armroyd v. The Un. Ins. Co.*, 3 Bin. 437, 447, *per Yeates, J.* *The Mar. Ins. Co. of N. Y. v. The Un. Ins. Co.*, 9 John. 186. *Callender v. The Ins. Co. of North America*, 5 Bin. 525. *Case & Richaud v. The Balt. Ins. Co.*, 7 Cranch, 358. *Hurtin v. The Un. Ins. Co.*, 1 Condly's Marsh. 281, a. note. *Robinson v. The Mar. Ins. Co.*, 2 John. 323.)

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The action on the new contract is an equitable one. It rests on the ground of benefit to the owner or consignee of the goods ; (3 Chit. Com. Law, 414 ;) and if the judge was right in holding us liable, it does not follow that we are not to be allowed the expense incurred, in transporting the goods from *Princetown* to *New-York*. This should be deducted from, or set off against the plaintiff's claim. (*Coffin v. Storer*, 5 Mass. Rep. 252.)

If the master refused to do what was in his power to forward the goods, he broke his charter party ; and has lost all right to recover upon it. Freight, then, should be denied on this ground ; or, at least, equitably reduced. The engagement to the freighter has not been fulfilled. On every principle of equity, here should be at least a deduction. (*Hunter v. Princep*, 10 East, 394, *per Ld. Ellenborough, C. J.* *Portland Bank v. Stubbs*, 6 Mass. Rep. 422. *Osgood v. Groning*, 2 Campb. 466.) The last case shows that it should have been left to the jury to say, whether the master might reasonably have been required to go on with the voyage. (And see *Laues' Charter Parties*, 160.)

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J. Duer, contra. The questions submitted upon the judge's charge, do not arise out of the case contained in the bill of exceptions. True, they apply to the charge, which was also out of the case. When the judge says that an acceptance under any circumstances will render the defendant liable, he lays down an abstract proposition, which we are not bound to defend. It is enough for us, that the defendant is liable under the circumstances of this case. The court will not grant a new trial on a case, when they see it must result in a verdict against the defendant, at least, as large as the present one. The complaint lies, in truth, on the side of the plaintiff. He was entitled to full freight. The master offered to repair, and proceed with the cargo in the *Romeo*. To this the owner of the goods refused to accede. It was his own fault, that full freight was not earned. The authorities are clear, that we have a right to full freight under such circumstances. We agree that the refusal of the master to repair, or proceed in other vessels, gave a right to the agent to demand the goods, if he had done so immediately. Instead of doing so, he continued a negotiation on the subject for several days; and the master finally offered to repair and proceed with the goods while the negotiation was pending. We agree that an immediate demand of the goods would have freed the shipper from freight. It was in consequence of the offer to repair, and a suspicion of its insincerity, that the goods were finally demanded and delivered. Such is the defendant's own testimony. The jury have tried the question, whether the master intended to deliver the goods free of freight. That question was properly submitted to them.

The event on which *pro rata* freight is claimed, is not provided for in the contract between the parties. There may not, therefore, be any positive claim for it on an abandonment of the voyage at an intermediate port; yet there is a demand in justice, if the abandonment be not the fault of the master or ship owner; and the act of acceptance by the owner of the goods works a legal claim. The extent of this claim is not according to the benefit he may

receive ; but the expense incurred in the transportation so far. It is too much to say that there must not only be an acceptance, but a right freely to elect whether to accept or not. One consequence of this doctrine would be, that though the master can neither repair nor send on the goods by another vessel, yet an acceptance shall not entitle to freight. The contrary is clearly settled ; and yet the shipper has no election. In such a case, if the goods be demanded and delivered, a right to entire freight arises. I admit that some of the cases cited do countenance the idea, that there must be a freedom to elect ; that the acceptance must be voluntary and unconstrained ; that is to say, the master must not coerce an acceptance by a refusal to do all he reasonably can towards forwarding the goods. But the rule, as considered and laid down in *Abbott on Shipp.* 336, *Story's ed.* pt. 3, ch. 7, s. 2, fully accords with the charge of the judge. This book says, if the master be unable, or decline to forward the goods, yet an acceptance will bind to pay freight, *pro rata itineris peracti*. It will be seen there, that the ancient authorities do not proceed on the ground of a new contract : but that freight was due by the maritime law, by force of the acceptance. This is the ground on which *Luke v. Lyde*, (2 Burr. 886,) was decided. That case went on *Lutwidge v. Grey*, (*Abb. on Sh.* *Story's ed.* 340,) which was grounded on the acceptance ; and the cases in this court have gone on the same principle. (1 *John. Cas.* 383. 2 *Caines' Rep.* 21. *Robinson v. The Mar. Ins. Co.*, 2 *John. Rep.* 322.)

It has been long settled, that expense or other circumstance in the subsequent disposition of the goods, cannot vary the amount of the recovery. The rule on this head is laid down in the case last cited.

Griffin, in reply. At least, the judge should have submitted, in terms, to the jury, whether the final offer of the master to repair was sincere ; and at all to be relied upon.

I have before given several judicial interpretations of *Luke v. Lyde* ; and I will now give two more : *Post v.*

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Robertson, (1 *John. Rep.* 24,) and *Bradhurst v. Col. Ins. Co.*, (9 *John.* 19, 20.)

I admit that commentators, and *Abbott* among the number, have differed from the courts. The only collision, however, is in commentators. There is none in the adjudged cases.

Curia, per SUTHERLAND, J. This court has repeatedly held, that freight *pro rata itineris* is due, where a ship, in consequence of the perils of the sea, without any fault of the master, goes into a port short of her destination; and is unable to prosecute the voyage; and the goods are received by the owner at such intermediate port. (2 *Caines*, 21. 1 *John.* 27. 2 *John.* 323, 336. 9 *John.* 19, 20, 186.) This principle has been adopted from the decisions of the English courts, commencing with *Luke v. Lyde*, (2 *Burr.* 882,) and continued, without any essential conflict or contrariety, down to the present time. (7 *T. R.* 381. 5 *East*, 316. 10 *East*, 393, 526. 2 *Campb.* 466. 3 *Bin.* 448. 5 *id.* 525. 7 *Cranch*, 358. 1 *Marsh.* 281, *note.*)

This general principle is not disputed by the defendant's counsel. On the other hand, it is conceded, that where the master refuses to repair his ship and send on the goods, or to procure other vessels for the purpose, and the owner of the goods then receives them, that this is not such an acceptance of the goods, as will entitle the ship owner to a *pro rata* freight. It is not a voluntary acceptance. He does not elect to receive his goods at the intermediate port, and sell them there, or become his own carrier to the port of destination. He does not assent to the termination of the voyage at the intermediate port: but it having been terminated there against his will, by the refusal of the master to send on his goods to the port of destination, he does not, by receiving them under such circumstances, in judgment of law, promise to pay the freight to the intermediate port.

The judge, in his charge to the jury, entirely excluded the question, whether the acceptance of the goods was

voluntary or not ; and instructed them that the fact of receiving the goods under any circumstances, rendered the owner liable for a *pro rata* freight ; unless he could show an express and positive agreement of the master, at the time of the delivery of the goods, to waive and discharge all claim to the freight. In this I think he erred. The cases already cited, particularly those in 9 *John.* show, that, in order to raise an implied assumpsit in such cases, the acceptance must be voluntary. No other rule would be consonant with justice or equity.

But the master did finally declare his election to repair his ship, and send on the goods ; and they were agreed to be received by the defendant's agent, after such declaration had been made to him. This was at first upon the express condition of his giving an order on the defendant for the freight ; but finally they were delivered and received without any such condition. These circumstances are claimed to be sufficient to sustain the verdict ; and it is said, admitting the judge's charge to be incorrect, as it goes beyond the facts, a new trial should not, for that reason, be granted. Under the circumstances of the case, the agent might well have supposed that there was no *bona fide* intention to repair. He swears that such was his opinion ; and that the goods were finally delivered unconditionally ; that is, (as I understand him,) without any order having been given for the freight.

I think the judge should have left it to the jury to determine whether the master did intend to repair the vessel, and complete the voyage ; and whether the acceptance of the goods by the agent of the defendant was voluntary or not.

New trial granted.

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THE PEOPLE *against* WALBRIDGE. (a)

An indictment against an attorney, &c. upon the statute, (*sess.* 41, ch. 259, s. 1,) for buying a note, need not allege that he bought the note with intent to prosecute, &c.; nor that the note has been prosecuted; nor need it show when it became due, its amount, or other circumstance, from which an intent to prosecute is to be inferred.

The act of buying is the offence, unless it come within the proviso of the statute; which it lies with the defendant to show.

The statute is constitutional.

The indictment upon it may conclude, contrary to the form of the statute, in the singular. It need not be contrary to the form of the statutes.

The omission, in reciting the title, of

At the *Rensselaer* oyer and terminer, in *November*, 1824, an indictment was found against the defendant; the first count of which charged, that on the 20th day of *April*, 1824, he did buy a certain promissory note, of and from one *J. B. S.*, the holder and proprietor of the note, which was made and signed by one *W. M.* and dated *April* 14th, 1824; by which note *W. M.* promised to pay one *A. V.* the sum of \$125,50, at the bank of *Lansingburgh*, in 90 days from the date; that the note was endorsed by *A. V. A.*, whereby it became and was the property of *J. B. S.* till the purchase by the defendant, for a good and valuable consideration; the defendant, at the time he so purchased, being an attorney and counsellor of the supreme court of judicature of the state of *New-York*, and of the court of common pleas of the county of *Rensselaer*; and that he did not buy or receive the note in payment for any estate real or personal, or for any services actually rendered, or for any debt antecedently contracted, or for any purpose of remittance, without any intent to violate or evade the act, &c. entitled "an act to prevent abuses in the practice of law, and to regulate costs in certain cases," passed *April* 21, 1818; to the evil, &c. and against the form of the statute in such case made and provided; and against, &c.

2d count. That the defendant, on the 1st day of *November*, 1824, did buy of and from one *P. B.* and become interested in buying of and from *P. B.*, a certain other promissory note, made and signed by *W. M.*, by which *W. M.* promised to pay to *P. B.*, or bearer, the sum of \$42,60, the defendant at the time he so bought and purchased the last mentioned note, being and still being an attorney and counsellor of the supreme court of judicature of the people of the state of *New-York*; and that he did not buy or receive the same note in payment for any es-

of the word *the*, after *the practice of*, will not vitiate the indictment.

(a) This cause was decided in *May* term, 1826.

tate real or personal, or for any services actually rendered, or for any debt before that time contracted, or for any purpose of remittance; to the evil, &c. and against the form of the statute, &c. (as in the first count.)

3d count. That the defendant, on the 1st day of *November*, 1824, knowingly, wilfully, and corruptly became and was interested in buying a certain promissory note, made by one *W. M.* for the sum of \$125,50, payable to one *A. V. A.*, and also one other promissory note, made by *W. M.* payable to one *P. B.* or bearer; and also one other promissory note, made by *W. M.* to one *E. G.* for the sum of \$31,20; also one other promissory note, made by *W. M.* payable to one *C. F.* for a sum of money to the jurors unknown; the defendant, at the time of the purchase of each and every of these notes, and at the time he became so interested in the purchase thereof, being and still being an attorney and counsellor of the supreme court of judicature of the people of the state of *New-York*; and that he did not become interested in the purchase of either of these notes, by way of payment for any estate real or personal, or for any services rendered before the purchase of these notes respectively, or for any purpose of remittance, without any intent to evade or violate the act, &c. (as in the first count.)

At the oyer and terminer of the same county, in *June*, 1825, the defendant demurred generally to this indictment; and after argument, that court held the indictment sufficient; and rendered judgment against the defendant. They, however, advised the district attorney to have the questions arising on the indictment, submitted to the supreme court for their decision; and in case this court should agree with the oyer and terminer, that the defendant have liberty to plead not guilty.

Pursuant to this advice, the cause was argued and decided here.

Walbridge, in person. The indictment is defective both in form and substance. 1. *In form.* It misrecites the title of the statute (*sess. 41, ch. 259*.) upon which it is founded. The word *the* is omitted after the words *prac-*

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tice of. This is a material and fatal variance. (2 *Hawk. P. C. ch. 25, s. 101, 104.* 2 *Hal. P. C. 172.* *Bac. Abr. Indictment, (H.)* 1 *Doug. 97, per Ld. Mansfield.* 1 *Ld. Raym. 382.* 2 *Ld. Raym. 1038, 9.* 1 *Esp. Rep. 98.* 1 *Saund. 135, n. (3).* 6 *T. R. 776.*) A misrecital of the title is equally fatal, as if it were of the body of a statute. The title is a name given by the maker; and though it be not necessary to set it forth, if this be attempted, it must be done correctly. (*Esp. on Pen. Act. 101, 7.*)

Again; there are two statutes prohibiting the same thing; the statute of 1813, (*sess. 36, ch. 48, s. 7.*) and the statute of April 21, 1818, mentioned in the indictment. Yet the indictment concludes against a single statute. It should have concluded *contra formam statutorum.* (3 *Bac. Abr. Indictment, (H.) p. 114.* 2 *Hawk. P. C. 252.* *Esp. on Pen. Act. 114.*)

2. *In substance.* The indictment does not set forth the offence which the statute was made to prohibit. It should aver that the notes were purchased for *collection* or *prosecution.* An indictment upon a penal statute, must state all the circumstances which enter into the definition of the offence. And all penal statutes must be construed most favorable to the defendant. (1 *Hal. P. C. 170, 517.* 2 *id. 170, 2.* *Dy. 304.* 1 *Chit. Pl. 357.*) The mere act of buying a note is not an offence against the statute. (1 *Coven, 458.* 3 *Coven, 252.*) It does not appear that the notes were even due, when they were bought; and as to the note in the first count, it appears on the face of the indictment, not to have been due. The presumption is, that every man will meet his engagements; and it is impossible even to infer from the indictment that the notes were purchased for the purpose of prosecution. They were never prosecuted. Buying a note comes within the *proviso* of the first section, that a promissory note may be received in payment for estate real or personal. What is money but personal estate? The note mentioned in the second count is less than \$50. It could not be sued in a court of record with a view to

costs. So as to three of the notes in the third count. All three of these are set forth without date or time of payment; and an additional one without amount. This count is bad for uncertainty.

The abuses in the practice of the law intended to be prevented by the statute, were buying and prosecuting choses in action, and making bills of costs. The mere buying a note, is no part of the practice of the law.

The statute is unconstitutional, if the construction contended for on the other side be correct. Every class of citizens has equal natural rights, which the legislature cannot take away more from one class than another. To say that one shall not purchase a chose in action, because he is an attorney, is depriving him of a right which every citizen has an equal claim to; and which the legislature cannot take from him without his consent. They would have a right to prohibit the same thing to a merchant or mechanic, because he is a merchant or mechanic. They might, on the same principle, forbid the farmer to sell his wheat, for fear that he might loan his money at usury, or purchase rum and get drunk with it.

J. Pierson, (district attorney,) contra. As to the form. The variance complained of is immaterial. If it do not alter the sense, it will not vitiate. (1 *Chit. Cr. L.* 280, and the authorities there cited.) Besides, the recital may be rejected as surplusage. The counts all concluding contrary to the form of the statute, it was not necessary to recite the title at all. (*id.* 281.) The second count does not recite the title. The objection not applying to this, though it be good as to the other counts, will not, therefore, support the demurrer, which is general to all the counts. If any count is good, judgment must be against the defendant.

The two statutes referred to on the other side, are distinct and wholly unconnected. But the conclusion would be good, if the indictment were grounded on two statutes. It is never necessary to conclude an indictment as being contrary to the form of *statutes*, in the plural. (1 *Chit.*

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As to substance. The act of 1818 does not, either expressly or impliedly, require that the note should be bought for collection or prosecution, or that it must be prosecuted. To require either, would be inconsistent with the object which the legislature had in view. The construction contended for by the defendant, would render the statute nugatory. It would not go beyond the act of 1813. This court, whenever they have spoken of these acts, have recognized a difference, though they say the acts are *in pari materia*. (3 Cowen, 261. 1 Cowen, 452.) It is evident that the legislature esteemed the first act ineffectual, on account of its requiring an intent to prosecute to be shown. The difficulty of doing this, from the various modes of evasion resorted to, led the legislature to make the mere act of purchasing a chose in action the offence. They, in this manner, strike at the root of the evil. If this construction be correct, it is immaterial when the notes were dated, what their amount, or when due.

As to the objection for unconstitutionality : The legislature have the same right to impose restrictions upon attorneys in the practice of law, that they have to regulate inns and taverns, or the inspection of provisions. It is optional with the attorney, whether he will, or will not practice under such restrictions. (b)

The Court held the indictment to be good both in form and substance. They said, the intent with which an attorney or counsellor buys a note, need not be alleged in the indictment ; nor need it be averred that a prosecution has been commenced on it. The act of buying constitutes

(b) I remember that Mr. Cook, of Saratoga, appeared in this court, at the August term, next after the passage of the act of 1818, and moved to have his name stricken from the rolls of the court, as attorney and counsellor ; which the court ordered to be done.

the offence ; (c) and on this being shown, it lies with the defendant to make out that he is within the *proviso* of the statute. The date, amount, time when due, &c. with other circumstances going to the question of intent, are, therefore, immaterial. We think the legislature intended to forbid the purchase of notes, &c. by attorneys or counsellors, in all cases, except those coming within the language or spirit of the *proviso*.

We have no doubt the act is constitutional ; nor are the exceptions to the indictment, in point of form, well taken.

(c) The intent of the legislature, as rendered by the court, if it require manifestation by any thing out of the plain language of the statute, is confirmed by a comparison of this statute, with one copied from it in relation to justices and constables. The two acts are almost *verbatim* the same, (*mutatis mutandis*), with the addition of the distinguishing words in the latter, "for the purpose of commencing any action thereon." They run thus :—

Stat. sess. 41, ch. 359, s. 1.

"That no attorney or counsellor at law of any court of record in this state, shall, directly or indirectly buy, or be in any way or manner interested in buying any bond, bill, promissory note, bill of exchange, book debt, or other chose in action ; nor shall any such attorney or counsellor, by himself, or by or in the name of any other person, either before or after suit brought, lend or advance," &c. (provision against procuring debts for collection by loan.)

Stat. sess. 43, ch. 159, s. 1.

"That no justice of the peace, or constable, shall, directly or indirectly buy or be interested in buying, any bond, bill or promissory note, bill of exchange, book debt, or other chose in action, for the purpose of commencing any action thereon ; nor shall any justice or constable, by himself, or by or in the name of any other person or persons, either before or after suit brought, either lend or advance," &c. (provision against procuring debts for collection, by loan.)

Every body will see that the passage of the last act is a direct legislative construction of the first, as to the question of *purpose* or *intent* in buying the note, &c. ; and that this construction accords with that given by the supreme court in the principal case.

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Ex parte JENNINGS.

A patent or grant of land by the state, bounded on the margin of a river above tide water, carries the land to the grantee *usque filum aquæ*.

Otherwise, where it is bounded on a navigable river.

A navigable river, in the common law sense of the term, is only where the tide ebbs and flows.

A patent or grant of land was bounded on the margin of the *Chitteningo creek*; *held*, that it carried the land to the grantee, *usque filum aquæ*.

The water of the *Chitteningo creek* was diverted from a mill and other hydraulic works on that creek; the right to erect the works being claimed under a patent or grant from the state, bounded on the margin of the creek; *held*, that the appraisers appointed pursuant to the act, (*sess. 48, ch. 275, s. 1*), were bound to appraise the damages to the owners of the works, they having a right to erect them, and a right to the use of the waters; that this was a case within the statute, (*sess. 40, ch. 262, s. 3*.)

The appraisers having refused to act, on the ground that the property of the creek was in the state; and that, therefore, they had no jurisdiction; *held*, that a mandamus should issue commanding them to appraise.

The court granted a peremptory mandamus, on the first motion, the case being argued on both sides; and the court understanding that the appraisers were willing to abide by the decision on the facts as they then stood; but afterwards, on suggestion that the appraisers wished to bring error, they changed the rule into one for an alternative mandamus; so that the facts might be put on record by a return.

BEFORE, and at the time of the erection of the Erie canal, the relator was in possession, and claimed to be the owner in fee of various hydraulic works, standing on the margin of the *Chitteningo creek*, near the rapids, in the town of *Sullivan*, in the county of *Onondaga*. He had, before the erection of the canal, purchased the land on which the works stood, bordering on the creek, with about 200 acres of adjoining land. The works consisted of a flouring mill, two saw-mills, one carding-machine, and one clothier's works, which he claimed to be worth about \$10,000; and which were dependent for their operation on the waters of the *Chitteningo creek*. Being so possessed, about five years ago, this creek, with its main tributary branches, the *Cowassalon* and *Butternut*, above the relator's works, were taken into the Erie canal for a feeder. *Limestone creek*, which also formed a junction with the *Chitteningo*, above the relator's works, was likewise taken into the canal as a feeder in the fall of the year 1825. All the principal streams which formed the *Chitteningo creek*, where the relator's works are situated, are now made use of as feeders to the Erie canal. This canal

was erected by the state, which, since thus converting the waters of the *Chitteningo* to the purposes of the canal, has used the surplus water either for its own use for the benefit of the salt works at *Salina*, or disposed of it to individuals for the purpose of hydraulic works, they paying an annual revenue to the state for its use. By these operations, the relator's works have become nearly useless for the want of water.

About four years ago, he applied to the canal commissioners; and requested them to appraise his damages arising from thus diverting the water from his mills, pursuant to the statute, (*sess.* 40, *ch.* 262, *s.* 3, 4 *Laws*, 302, *b*; and *sess.* 44, *ch.* 240, *s.* 1, 5 *Laws*, 248, *c*.) but they neglected to make the appraisal. In the summer of 1825, after the passing of the act, (*sess.* 48, *ch.* 275, *s.* 1, 7 *Laws*, *p.* 398, *a*.) constituting a new board of appraisers, he made his application to them for the same purpose, which he repeated several times last winter, giving them notice in writing. This board consisted of *Henry Seymour*, *David Woods*, and *Joseph D. Selden*, Esquires.

On the 10th of *July* last, he laid before them his claim for damages; but they absolutely declined, and refused to make any appraisal, or to act upon the subject, or allow him any compensation whatever.

On the relator's affidavit showing these facts,

S. L. Edwards, moved for a mandamus, commanding the appraisers to proceed and make an appraisal in the premises.

S. Beardsley, contra, read an affidavit of Mr. *Henry Seymour*, one of the canal commissioners, and a member of the board of appraisal to whom *Jennings* had submitted his claim for damages, stating that the appraisers, against whom this motion was made, in their consultations upon *Jennings'* application, all agreed, as he understood, and now believes, that in point of fact, the state had not parted with the land upon which the *Chitteningo* passes, at the place claimed by *Jennings*; but had bounded purchases of and on the margin of the stream; so that, as he believes,

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(and he believes the other appraisers were satisfied of the fact being so,) the state was still the owner of the land covered by the waters of the stream; and had not parted with it, or contracted to part with it, to any person whatever; or authorized the use of the water of the stream for hydraulic purposes at the place in question.

A similar application was made by *N. P. Randall* in behalf of *Eglestone*, who claimed about 5000 dollars for damages from the same cause mentioned above in *Jennings'* case. The only difference was, that *Eglestone* had taken possession of the premises in question on his part, under a contract for a conveyance in fee, but which was not yet executed.

And now both motions were heard together.

Edwards and *Randall*, in support of the motions. The appraisers refuse to act, alleging that they have no jurisdiction. This objection is partly technical, as founded on the construction of their powers under the act; but mainly, because they claim the premises in question as the property of the state.

1. Suppose the bed of the creek never to have been granted by the state: can they divert the water from land owned by an individual, extending *only to the margin*? We contend not. The rule of law is *aqua currit, et debet currere*. Water flows in its natural course, and should always be permitted to run there; so that all through whose land it passes may have the privilege of using it; but not so as to injure another. (*Angell on Watercourses*, 5. *Merritt v. Parker*, *id.* App. 134.) The right to the use of water flowing by a man's land, belongs to the owner of common right. (*Co. Lit.* 261, a. *Mayor of Hull v. Barnes*, *Cowp.* 102.) A man possessing land on the banks of a river, has a right to the flow of the water in its natural stream, without alteration, or diminution. (*Bealy v. Shaw*, 6 East, 208, per *Graham*, B. at N. P. whose doctrine was recognized and affirmed on motion for a new trial.)

Though *Jennings* does not own lands on both sides of the stream, his right is perfect, to have the water flow *by and along* the side of his land. (*Angell on Watercourses*, 29. *Co. Lit.* 261, a. *Coup.* 102.)

But a grant bounded on the margin of a fresh water creek, or river, carries the land to the centre of the stream. It is well settled that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil. (*Angell on Watercourses*, 15. *Palmer v. Mulligan*, 3 *Caines' Rep.* 319. *Dav. Rep.* 152, 155, 157. 12 *Mod.* 510. 17 *John. Rep.* 195. 2 *Conn. Rep.* 481. 20 *John. Rep.* 99. 4 *Burr.* 2162.) Where one owns the soil under the water of a running stream, the right to the water course extends not to the fluid itself: but only to the advantage of its impetus. (*Angell on Watercourses*, 37, 39.) Where a creek not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be run in the centre. (*Jackson v. Low*, 12 *John. Rep.* 252, *per Yates, J.*)

We concede that the soil of the sea, and the soil where the tide ebbs and flows, between high and low water mark, belong to the public. (*Co. Lit.* 261, a. 2 *Bl. Com.* 262.)

Private rights are not to be impaired by the state, unless a compensation is provided. (*Angell on Watercourses*, 53, 4. *Gro. b.* 8, c. 14, s. 7. *Puf. b.* 8, c. 5, s. 7. 1 *Bl. Com.* 141. 2 *John. Ch. Rep.* 162.) If no compensation be provided, an action lies for the injury. (*Angell on Watercourses*, 65, 6, and the cases there cited. *id.* 53, 4, and the cases there cited.)

S. Beardsley, contra. The appraisers suppose they had no jurisdiction of the matter in relation to which they were called upon to act. The act of the 15th of April, 1817, prescribes their power, and lays down the principles of appraisal. (4 *Laws N. Y.* 302, b. s. 3.) The canal commissioners are authorized by this section, to take possession of "any lands, waters and streams," necessary for the prosecution of the canal; and in case these are not granted to the state, there is to be a just and equitable appraisal of the

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loss and damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises so required. And whether any damages are awarded or not, they are to describe the premises appropriated. The act of the 7th of April, 1819, section 3, (5 *Laws N. Y.* 123, a.,) extends the same principles to other parts of the canals. The subsequent acts do not alter the principle. The only change made, is in the board of appraisal. The 2d section of the last act, (*April 20, 1825, Laws N. Y.* 398, a.,) gives an appeal from the board of appraisers to the canal commissioners, whose decision shall be final.

The appraisers cannot act, unless it be in relation to such "lands, waters or streams," as may be given or granted to the people. And these must be such as some person may own, or in which they may have an interest. Besides; they must be property, the fee simple of which may vest in the state. For, on appraisal and payment, such is declared to be the consequence.

Water does not admit of ownership. The interest in it is merely usufructuary. It belongs to the first occupant only while he holds possession of it. (2 *Bl. Com.* 14, 18.) The fee simple cannot be vested in the state. No description can be made of it.

Eglestone has no legal interest; but merely a contract for a deed; and though *Jennings* purchased and has a deed, it does not appear of whom he made his purchase. A clear title should be made out; such an one as will be worth something to the state.

I am directed to insist that the *Chittenango* is a public stream; that it is public property in every sense of the word; and the state has title to the lands upon which it passes, the patents being bounded upon the margin of the stream, and not at its centre.

Rivers are of three kinds. 1. Such as are wholly and absolutely private property. 2. Such as are private property, subject to the servitude of the public interest by a passage upon them. The distinguishing test between these two is, whether they are susceptible or not of use for a

common passage. 3. Rivers where the tide ebbs and flows, which are called arms of the sea. (*People v. Platt*, 17 *John*. 211. *Hooker v. Cumming*, 20 *John*. 90. 4 *Burr*. 2164, *per Lord Mansfield*.)

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In the second kind, the public have the right of way ; and where the river is not granted in terms, it should not be holden to pass. A boundary *upon* the margin excludes it. The use of these large streams are important to the state in various ways ; and it never was the intention to part with the right of appropriating them to the use of the public. Individuals enjoy the benefit of them at sufferance from the state.

This is a question of great importance, not only to individual owners and the state, but to the canal commissioners. Probably more than \$100,000 on the lines of the canals, are involved in its issue. If the canal commissioners pay out money, on appraisals where there is no jurisdiction, the act is void ; and they are amenable to the state. They are therefore bound, in duty to themselves, in a doubtful case, to avoid appraisals ; and especially to avoid payment till the decision of this court can be had, which they are very willing to follow. Mr. *Seymour*, at whose request I now raise these questions, is anxious fully to indemnify these suffering individuals, if he is warranted in doing so ; and will most cheerfully follow the directions of this court.

I am not directed to raise the question here, as to the constitutional power of the legislature, to proceed in this manner : first to take private property, and then to appoint their own agents, dependent upon themselves, to make the appraisal. But I have certainly very serious doubts, whether the decision of judge *Patterson*, in *Van Horne's lessee v. Dorrance*, (2 *Dall*. 313, &c.) that they are bound to do this through the medium of the ordinary tribunals of the state, is not according to the law of the case. Should this court think the board itself unconstitutional, of course they will not interfere and compel an appraisal by mandamus.

Besides, the appraisers have a discretion. They are to exercise their judgment whether any damages are due,

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over and above the benefit which the individual derives from the canal. They may have proceeded on this ground. If so, this court certainly will not control or coerce them by mandamus. (19 *John*. 262. 12 *John*. 415. 2 *Coven*, 444.)

Randall, in reply. It is true, on the authorities cited, that this court will not interfere by mandamus where the inferior tribunal has a discretion, and has acted on that discretion. Here is an utter refusal to act at all; and, moreover, the ground is stated on which that refusal is founded. This is the very case, of all others, in which the court should interfere; a case where there is no other legal remedy. Such is the language of the cases cited to this point. The appraisers have been pressed to act again and again. They have uniformly refused. The legislature have been applied to. They refused to act, on the ground that the case is a proper one for appraisal.

It is true, that running water, as such, is not strictly the subject of property. But if we have no property in it, neither have the state. The property in water depends on the ownership of the soil *through* or *by* which it flows. Though there cannot be a grant of water *eo nomine*, the right to use it may be granted, in fee, or for any lesser time. The act should be liberally construed in favor of individual right. If there be no provision for indemnity, the commissioners are wrong doers; and are liable to an action. It is not to be supposed that the state will take the property of any individual without providing the means of paying him for it.

It is enough that the applicants are in possession of the premises in question. The appraisers must satisfy themselves of the extent of their interest, pay them for it, and it then passes to the state, whatever it is. What we complain of is, that they refuse to pass upon the subject; claiming the whole for the state.

It is certainly due to Mr. *Seymour*, to say that he is not only willing, but anxious to allow these applicants an indemnity, provided he can feel himself warranted in doing

so. We do not know the views of the other gentlemen who compose the board ; but we presume they are also anxious that justice should be done ; and that it is delayed only by an apprehended want of authority.

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Curia. By the third section of "an act respecting navigable communications between the great western and northern lakes and the Atlantic ocean," (*sess.* 40, *ch.* 262,) the canal commissioners are authorized to take possession of, and use any "lands, *waters and streams*," necessary for the prosecution of the improvements intended by the act ; and, by the same section, the commissioners of appraisal are "to make a just and equitable estimate and appraisal of the loss and damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or *parties interested* in the premises so required, &c., by, and in consequence of making and constructing any of the works aforesaid." It is admitted that the principles of appraisal have not been changed by any subsequent act.

In this, and the subsequent act, there is ample provision, we think, for allowing compensation for all damages to private property occasioned by the canal commissioners in the prosecution of their duties, whether such damage be direct or consequential. *Waters and streams* in which the relators claim an *interest*, are taken for the use of the canal. It is a case within the very words of the act. If not so, if it were a question of construction, there can be no doubt that such construction should be most liberal in favor of private right. Individual property cannot be taken ; or, which is the same thing, individual rights impaired, for the benefit of the public, without just compensation. Such is the language of the common law, and of the constitution. It would be derogating from the justice of the legislature, to suppose they would stop short of providing for compensation in such a case.

Whatever interest the claimant of damages may have, he is to be paid for ; and the state then succeeds to his right. The state becomes a purchaser. True, the same

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section which provides for the appraisal, &c., says this acquisition shall be in *fee simple*; but this may well be, though the individual claimant may have only a limited interest, a particular estate, for instance; or a right merely equitable, the reversion or legal estate residing elsewhere. If so, when the whole shall be paid for, the whole will vest in the state. The question as to the extent and value of interest, is one for the appraisers; and respects the amount of damages, and the persons to whom they are to be paid. We see no more difficulty in describing and entering in a book the various interests which different persons may have in the flow of water, whether immediate, reversionary, legal or equitable, than in designating the like interests in land. It cannot be allowed, because the estate is less than a fee, or because it is merely incidental to, or issuing out of land, that, therefore, the owner should be divested of his right without compensation. The right to the flow of water over land, is commensurate with the interest in the land. It many times constitutes the main value of the property; and is accordingly made the subject of compensation and acquisition by the very terms of the statute. A conventional transfer of such a right, by grant, would, no doubt, be valid.

There can be no doubt that a mandamus is the proper remedy. This is not the case of error in the act of appraisal; but the commissioners have *refused* to make any appraisal whatever. This is not denied; and a mandamus is asked for, commanding the appraisers to proceed, and value the interests of the relators at what they are worth.

So much as to the preliminary objections. These were considered by the counsel, and are, indeed, of minor consequence, compared with the question of right; which is put by the appraisers on the construction to be given to the state grant of the lands bordering on the *Chitteningo*. The objection is contained in the affidavits of *Mr. Seymour*, "that, in point of fact, the state had not parted with the land upon which the *Chitteningo* passes, at the places claimed, but had bounded purchases of land *on the margin of the stream*; so that, as he believes, (and he be-

lieves the other appraisers were satisfied of the fact being so,) the state was still the owner of the land covered by the waters of the stream, and had not parted with it, or contracted to part with it to any person whatever; or authorized the use of the water for hydraulic purposes at the places in question."

If the construction set up by the commissioners be the true one, if the state owns the land covered by the water, it is clear that, though the relators may be entitled to the use of the water flowing by, and touching upon them for all ordinary purposes, yet they cannot build mills upon, and raise the water of the stream. They are trespassers; and the state may claim not only the water, but the mills themselves, so far as they encroach upon the stream.

We do not, however, entertain a doubt that the appraisers have misapprehended the construction of the state grants. It is not pretended that the *Chittenango* is a navigable creek or river, where the tide ebbs and flows. Such is notoriously not the fact. The decisions upon the construction of grants, bordering on streams, are numerous in the reports, not only of this, but of other states, and of *England*; and, so far as they proceed upon the common law, they are uniform. The cases have generally arisen upon disputes concerning the rights of fishery; and though relating to rivers of the first magnitude, where the public have an acknowledged right of passage for rafts, boats, &c., yet the owners of land on the margin, above tide water, have been allowed the several and exclusive right of fishery to the centre of the stream opposite their respective farms; and where their land lies on both sides, they have been allowed the same right in the whole river, so far as their farms extend.

It is not necessary to go into the various cases on this subject. They were mostly cited upon the argument. They proceed upon the principle that the owner of the land on the margin, owns the bed over which the river passes; and though it be nominally and in terms bounded on the margin, it extends, by construction of law, to the centre of the stream. The public right is one of passage,

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and nothing more ; as in a common highway. It is called by the cases an *easement* ; and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, &c. inconvenient or unsafe, he is guilty of a nuisance ; and this is the only restriction which the law imposes upon him. It follows, that neither the state nor any individual have a right to divert the stream, or render it less useful or valuable to the owner of the soil. If the state had intended to retain the property in the stream, they should have inserted an express reservation or exception in their grants.

An opposite rule prevails in the construction of grants bounded on the margin of navigable rivers. By the term *navigable river*, the law does not mean such as is navigable in common parlance. The smallest creek may be so to a certain extent, as well as the largest river, without being legally a navigable stream. The term has in law a technical meaning ; and applies to all streams, rivers or arms of the sea, where the tide ebbs and flows. A public grant, bounded on the margin of such waters, extends by construction no farther than high water mark, and leaves, as to the rest, an absolute proprietary interest in the public. Above the flow of the tide, the river becomes private, either absolutely so, or subject to the public right of way, accordingly as it is a small or a large stream.

In this case, we decide that the grant, as set forth by Mr. *Seymour*, carried the land to the middle of the creek ; and that, therefore, the interest is out of the state. We think the relators have shown an interest which entitles them to an appraisal ; and it is for the appraisers to determine its extent, on the hearing before them.

Rule for a peremptory mandamus.

The above arguments and decision were at *August* term last.

The following rule was entered in the case of *Eglestone* :

ON reading and filing the affidavit of *Darius Eglestone*, showing that he is in possession of a lot of land and mill, situated on the *Chitteningo* creek, in the town of *Sullivan*; that the water has been diverted from the said creek for the use of the *Erie* canal; that he has made application to *Henry Seymour*, *David Woods* and *Joseph D. Selden*, to estimate and appraise the damages which the said *Darius* has sustained on occasion of the diversion of the said creek; and that the said appraisers refuse to make any appraisal or estimate of said damages; and on reading and filing the affidavit of *Henry Seymour*, explaining the reasons why the said appraisers refuse to appraise and estimate said damages; on motion of Mr. *N. P. Randall*, and the same being argued by him on behalf of the relator, and by Mr. *Beardsley* on behalf of the said appraisers; and it appearing to the court that the said *Darius* has an interest in the premises, which entitles him to an appraisal of damages, if any have been in fact sustained; it is, therefore, ORDERED, that a mandamus issue, to be directed to the said *Henry Seymour*, *David Woods* and *Joseph D. Selden*, commanding them to proceed to appraise and estimate the damages of the said *Darius Eglestone*, on occasion of the taking of the waters of the said creek for the use of the *Erie* canal, over and above the benefit and advantage to the said *Darius*, by and in consequence of making and constructing the said canal.

A similar rule was entered in the cause *ex rel. Jennings*.

During the last vacation, on the application of Mr. *Beardsley*, in behalf of the canal appraisers, the CHIEF JUSTICE granted an order to stay proceedings in the cause, in order that there might be a re-argument; and that, at least, the court might be moved to vacate the rule for a peremptory mandamus, and to grant one for an alternative mandamus only, so as to bring the question more fully and solemnly before them on the return of the appraisers.

A motion was now made accordingly.

Talcott, (attorney general,) for the motion. So far as the merits of the question are concerned, there is but

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one ground on which a mandamus can be claimed. That is, that these relators had such an interest in the water diverted as to be damnified. With deference, it would seem to me that the relators are precluded from taking that ground, by the fact that the appraisers did consider and decide upon the claim. They went into the merits; and *held* that the grant of the state being bounded on the margin of the creek, would not carry its bed to the original grantees; that, therefore, the relators, could have no interest. Besides; as to *Eglestone*, he pretends no legal interest. The relators should have taken their remedy by appeal.

That a party may convey to the margin of a stream, without conveying *ad filum aquæ*, is settled by the case of *Jackson v. Halstead*, (5 Cowen, 216.) If this may be so, the relators are bound to show clearly and particularly, why it was not so in their case. They should set forth the grants, in order that it may be seen whether their claim is justified in the full extent to which it is preferred. We insist that the boundary stopped at the margin. We can do no more; and this is all that should be required of us. We cannot show the deeds. It is not competent for the relators to infer from the words which we use, that the grant extends beyond the margin. Omitting to produce their title, every inference should be made against them.

What *Eglestone's* contract is, does not fully appear. It is evidently but an executory contract, and passes no legal title. It may have been forfeited; and all equitable title gone.

Bandall and *Edwards*, contra. This is the first time we have heard that the appraisers have made any adjudication. It was not pretended on the former argument. We state in our affidavits that the appraisers had refused to act; and the contrary is not pretended by the affidavit of Mr. *Seymour*. So far from this, we understand him as ingenuously admitting that the appraisers had refused to adjudicate. We asked a mandamus compelling them to

make a judicial decision, from which we might appeal, if it should not be satisfactory. This was granted, and is now sought to be set aside or qualified, without any new facts being shown.

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The relators are in possession. This is, *prima facie*, evidence of title. It gives them the right to an appraisal according to their interest. The statute is broad in its terms: and extends to all persons who are injured. The decision of the court at the last term, went upon the boundary, as set up by *Seymour* himself. They held that a boundary on the margin, carried the grantee to the centre of the river. *Jackson v. Halstead*, cited by the attorney general, has no more application to the point before the court, than any other case which he might have cited. The question was, whether the words "including the same," (i. e. *the river*,) used in a grant, would pass the bed of the river, or only a right of fishery. Clearly the words would not pass the soil. Neither the case, the counsel, nor the court, lisped a word as to the operation of a grant bounded on a river. Not an authority was cited to this point. It turned entirely on the construction of the words used in describing the subject matter. Because the question now before the court might have arisen, does it follow that the well settled doctrine of the common law is to be overturned? A doctrine to which we before cited many authorities, and against which not one common law authority has been or can be found. We say common law authority; because we except the cases in *Pennsylvania*. They reject the common law, which this court is not authorized to do. We now add other authorities to the point, that where one owns the land on a river above tide water, he owns the river itself on his side, *ad filum aquæ*. (*Lord Fitzwalter's case*, 1 *Mod.* 105. *Carter v. Murcot*, 4 *Bur.* 2162. *Rex v. Smith*, *Doug.* 444. 2 *Rol. Abr.* 170, pl. 14. 15 *John.* 454, *per Platt, J.* *Hayes' Exr. v. Bowman*, 1 *Randolph's, Virg. Rep.* 417. *Claremont v. Carlton*, 2 *N. H. Rep.* 369.) A water course does not depend on prescription; but is *ex jure naturæ*. (3 *Bulstr.* 340. 1 *Wils.* 174.)

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Where grants are made, like those upon this creek, for 12 and 20 miles along the stream, to deprive the grantees of the water, would be a fraud upon the subject. The original purchases and settlements were made, and a consideration paid to the state, on the faith of the various benefits to be derived from using the waters of this stream. High prices have been given by subsequent purchasers with a view to the same privileges. These constitute the main value of the land. If there was an intention in the state to reserve the stream, an express reservation or exception should have been inserted; or the intention in some other way made known to the purchaser. He takes under boundaries terminating *at the creek* or the *margin of the creek*. The meaning of the parties is the same. It is, that the grantee should have the benefit of the stream. Wherever his grant touches the water, the common law gives him a right to the stream, subject in some cases to a right of passage; but not so in this case. The *Chittenango* is an inconsiderable creek, hardly navigable for small boats at the place in question. The state might as well claim every insignificant stream within its borders, on the ground of some equivocal words in the grant. The doctrine of *Hargrave*, cited on the former argument, is the law of this state. It has been recognized by repeated decisions of our courts. If the grant of a party touches a stream above tide water, he owns of common right to the centre.

It is idle now to talk of our having no right. The appraisers do not place themselves on a defect in our title. They set up a claim in the state. This is the open and avowed ground, under the oath of Mr. *Seymour*. They do not mean to allow any one damages for subverting these valuable mills and mill privileges. Why did they not enter into an enquiry as to the title? If it is not in the relators, it is in some other person or persons, and damages are due somewhere. No. This valuable property has been converted to the use of the state. The state derives a revenue from rent of the surplus waters to about \$1000 *per annum*; and yet the true owners are set at defiance.

The appraisers would have had no difficulty, if the title be not in us, in finding it to be in somebody whom it is their duty to pay. We need not produce our deeds here. Title is a question before them. We are in possession. If that possession has been rendered valueless to us for only *three days*, instead of more than that number of years, as is the fact, we have sustained some damages for which we are entitled to an appraisement.

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But suppose all authority is to be overturned; and that we are to be restrained to the *margin*, the nominal boundary, according to the terms of the grant as set up by the appraisers; still we touch the stream; and if the state own the bed, they have no right on that ground to divert the water. It takes its course from nature; and though it runs over the land of another, he has no right to divert it. This was abundantly shown by authorities cited on the former argument. It is a new refinement, to say that a grant bounded *on the margin of the creek* does not touch the creek.

Talcott, in reply. I shall never appear before this court, or any other, to advocate a doctrine which would operate as a fraud on purchasers. When the state desire this, they must seek some other instrument. But I feel bound to resist all claims upon the public not founded in right. I admit that, whether the relators show a right to the land under the water or not, they are entitled to some compensation, provided they make out a right in themselves to the land adjoining the water. The state has no more right to divert the water than an individual; and if these relators own the land under the water, then clearly they are entitled to full damages. The question is, how they are to show their right? If the inquiry had been before a jury, they must have established their claim by a proper deduction of title, or other proof of their interest. And if this be a case in which all that we can require of the parties is, to make their own affidavits; and they omit to set forth their boundaries; is it not to be inferred, that had they

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been set forth, they would have excluded the stream? Is not every presumption to be against them? If an exception or reservation be necessary to exclude the stream, is not this to be presumed? If there may be any case in which they would fail of a right to the centre of the stream, is it not to be presumed? If the grants were produced, there might be an exception. If the proof here produced is to be sufficient; no matter what the boundary; every one bounded on a stream, whether there be an exception or not, will obtain damages.

I said the appraisers have made a decision; and am answered that there was no adjudication. What is there lacking to a complete adjudication? An application was made to the appraisers; and on what was heard, they decided against the claim. The affidavits of the relators complain that they refused and did not appraise. And they ought not, if the decision be correct. They refused to appraise; because they adjudged that the relators had no right. If there was error in this, the remedy is not by mandamus. It is said the refusal to act, if it be so considered, is owing to a mistake of the law. The court will not, I trust, dispose of so important a question by granting a peremptory mandamus. They will rather award an alternative mandamus; in order that all the facts may be brought before them upon the return; and that the state may have its writ of error. At present, they are deprived of this privilege, the facts not appearing on the record.

But if there be no error, then, of course, they will not grant an alternative mandamus. The error should be shown positively. On the case made out, the court will presume that the parties dare not swear that their land extended to the centre.

When the case of *Jackson v. Halstead* is compared with others, it will be found there is no material difference between them. The doctrine of *Hargrave*, that the owner of the bank owns to the centre of the stream, in all rivers where the tide does not ebb and flow, has been too long settled, and too often recognized, to be disputed by any one making the least pretensions to legal knowledge. I do



not deny that doctrine. I am insisting that there may be exceptions to that rule. I do this on the authority of *Jackson v. Halstead*. There is no need of a positive exception or reservation, if the grantee is limited to a particular boundary on the shore. This stops him short of the centre. It may or may not be, that these relators are bounded on the centre. If they are, let them be required to show the fact.

It is said the state cannot divert the water, without allowing damages, if the titles of the relators touch the river. I have admitted this; but the same answer applies. Let them show their right particularly. If they do not reach the stream, they have no right to the value of the water. If the boundary stops at the margin, they have no right to the water or the use of the water.

- SUTHERLAND, J. intimated when the attorney general first moved, that there could be no objection to change the peremptory mandamus into an alternative one, if this alone was requested. The court, at the last term, understood the counsel for the appraisers as saying explicitly, that nothing farther was desired than the opinion of the court on the case, as it then stood; which would be acquiesced in by the appraisers. Otherwise, the course would have been to grant an alternative mandamus.

After the argument was closed; and the court had taken several days for advisement,

SAVAGE, Ch. J. remarked, that the main question made at the last term related to the extent of the boundary. The court were then of the opinion, that it carried the land to the centre of the stream. Nothing which had fallen from the attorney general on the re-argument, had changed their opinion upon this point. Objections, that a mandamus will not lie; and that the relators do not make out their case, are now started; but we adhere to the opinion, that the case is one to which the remedy by mandamus is applicable; and that the case is sufficiently made out in evidence. We understand the appraisers refused to act

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because they thought the bed of the *Chilteningo* belonged to the state; that they therefore had no jurisdiction, private property not being invaded. We hold otherwise; that private property has been invaded; that they have jurisdiction; and should go on and appraise. To what particular individuals the property may belong, is a question for them to decide.

It is, however, suggested, that the question is an important one, on account of the amount of the property involved in it; and that it should be put in such a shape as to be reviewed on error, should the state desire this. We think the suggestion perfectly right; and with a view to that object, we direct the former rule and subsequent proceedings to be vacated, and that an alternative mandamus issue. This will enable the appraisers to put the facts on record by a return, if they shall be so advised; and the judgment to be rendered on that return may be reviewed.

Rule accordingly.(a)

(a) The treatise of sir *Matthew Hale*, *De Jure Maris* has been so often recognized in this country, and in *England*, that it has become the text book, from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water. (Vid. *Palmer v. Mulligan*, 3 *Cain. Rep.* 307. *id.* 315, per *Thompson, J.* *id.* 313, per *Kent, C. J.* *People v. Platt*, 17 *John.* 195, 209, 210. *Hooker v. Cummings*, 20 *John.* 90, 99 to 101. *Adams v. Pease*, 2 *Con. Rep. N. S.* 481, 483, 484. *Arnold v. Mundy*, 1 *Halst. Rep.* 1, 74. *Claremont v. Carlton*, 2 *N. H. Rep.* 369, 371. *Hays's Exr. v. Bowman*, 1 *Randolph's Rep.* 417, 420.) In *England*, even on rights of prerogative, the courts scan his words with as much care as if they had been found in *Magna Charta*; and the meaning once ascertained, they do not trouble themselves to search any farther. (Vid. *The King v. Lord Yarborough*, 3 *Barnw. & Creswell*, 91.) They almost justify, in respect to his writings, the extravagant encomium which Mr. *Wirt* has passed upon him as a judge; that, "with a mind beaming the effulgence of noon-day, he sat on the bench like a descended god!" (2 *Burr. Tr. by Rob.* 67.) His work is so often quoted, his doctrines are so full, his distinctions so clear, and his illustrations so striking and apposite, that they seem to deserve an insertion in our books, somewhat more at length than they are to be found in the quotations of counsel or judges; especially as there is, (I believe,) no late edition of the work; and, to many of the profession, it is not, therefore, readily accessible. It was first published by the learned *Fra. Hargrave*

among various other titles; and is usually cited as *Harg. Law Tracts*. The only title material to our purpose, "*De jure maris et brachiorum ejusdem*," is the first part of a manuscript treatise in three parts, by Lord Ch. Justice *Hale*; and is therefore, sometimes cited as *Hale De jure*, &c. This first part is divided into seven chapters of about 44 small octavo pages in the whole. The course I propose in this note, is to give the mere text of 4 chapters in this first part, *verbatim*, generally omitting the author's quotations; which are mostly of MSS, or of old treatises, entries and reports; all of which are, *quoad hoc*, superseded by the high authority of *Hale*. Instead of these, I will insert such late authorities, especially *American*, as have passed upon the very position laid down by him.

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#### PARS PRIMA.

*De Jure Maris et Brachiorum ejusdem.*

#### CAP. I.

*Concerning the interest of fresh rivers.*

Fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil; and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side, the right of soil or ownership, and fishing unto the *filum aquæ* on their side. And, if a man be owner of the land of both sides, in common presumption, he is owner of the whole river; and hath the right of fishing according to the extent of his land in length. With this agrees the common experience. [*Palmer v. Muligan, &c. and other cases cited above at the beginning of this note.*]

But special usage may alter that common presumption; for one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof; and another the free or several fishing in that river.

If a fresh river, between the lands of two lords or owners, do insensibly gain on one side, or the other side; it is held that the propriety continues as before in the river. [What shall be deemed insensible gain. *The King v. Ld. Yarborough*, cited *ante*, in this note.] But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds. As if the river running between the lands of A. and B., leaves his course; and sensibly makes his channel entirely in the lands of A.; the whole river belongs to A. *Aqua cedit solo*. And so it is, though if the alteration be by insensible degrees, but there be other known boundaries, as stakes or extent of land. 22 *Ass. pl.* 93. And though the book make a question, whether it hold the same law in the case of the sea or the arms of it; yet certainly the law will be all one, as we shall have occasion to show in the ensuing discourse.

But yet special custom may alter the case in great rivers. For instance the river of *Severn*, which is a wild river; yet, by the common custom used below *Gloucester bridge*, it is the common boundary of the manors of either side, what course soever the river takes; viz. the *filum aquæ* is the common mark or boundary; though it borrow great quantities of

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land, sometimes of the one side, sometimes of the other; and gives them to the opposite shore.

Though fresh rivers are, in point of propriety, as before, *prima facie*, of a private interest; yet, as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected by them: viz. one of prerogative belonging to the king, and another of public interest, or belonging to the people in general.

Of these in the ensuing chapters.

## CAP. II.

### *Of the right of prerogative in private or fresh rivers.*

The king, by an ancient right of prerogative, hath had a certain interest in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or arms of the sea; and those are these which follow:

1st. A *right of franchise or privilege*, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the King. He [*the owner*] may make a ferry for his own use or the use of his family; but not for the common use of all the King's subjects passing that way; because it doth, in consequent, tend to a common charge; and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation; viz. that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he [*the ferryman*] fail in these he is finable. And hence it is, that if a common bridge be broken, whereby there is no passage, but by a boat or ferry; it hath been anciently practised in the exchequer, to compel that ferryman, that ferries over people for profit, without a charter from the King or a lawful prescription, to account for the benefit above his reasonable pains and charge.

And this that is said in reference to a fresh or private river, holds place much more in a public river or arm of the sea; and therefore it need not be repeated when we come to that subject.

2dly. An *interest*, as I may call it, of *pleasure or recreation*. [Inapplicable to the U. States; and obsolete in *England*, as Hale says.]

3d. An *interest of Jurisdiction*; viz. in reference to common nuisances in or by rivers; as where the sewers were not kept, which gave rise to the commission of sewers, as well for fresh rivers as for salt.

And another part of the King's jurisdiction in reformation of nuisances is, to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for, as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *alta via regia*, so these public rivers for public passage are called *fluvii regales*, and *haut streames le Roy*; not in reference to the propriety of the river, but to the public use; all things of public safety and convenience being in a special manner under the King's

care, supervision and protection. And therefore the report in sir *John Daves*, of the piscary of *Ban*, mistakes the reason of those books, that call these *streames le Roy*, as if they were so called in respect to propriety, as 19 *Ass. 6. Dy. 11*. For they are called so because they are of public use, and under the King's special care and protection, whether the soil be his or not.

And this leads me to the third chapter.

## CAP. III.

*Concerning public streams.*

There be some streams or rivers, that are private, not only in propriety or ownership; but also in use, as little streams and rivers that are not a common passage for the King's people. Again; there be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters. And these whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods, or both, from one inland town to another. Thus the rivers of *Wey*, of *Severn*, of *Thames* and divers others, as well above the bridges and ports as below; as well above the flowings of the sea as below, and as well where they have come to be of private propriety, as in what part they are of the King's propriety, are public rivers *juris publici*. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statute of *Magna Charta*, cap. 23.

*Omnes kidelli deponantur per Thamifam et Medwayam, et per totam Angliam nisi per cofteram maris.*

These kind of nuisances were such as hindered or obstructed the passage of boats, as wears, piles, choaking up the passage with filth, diverting of the water by cuts or trenches, decay of the banks, or the like.

And they were reformed.

Sometimes by indictments or presentments in the leets, sessions of the peace, oyer and terminer, or before justices of assize.

Often times in the king's bench; as *Hil. 50 E. 3. B. R. Rot. 23*. for nuisances in the river *Trent*; *H. 23. E. 3. B. R. Rot. 61*. in the river *Ouse*; *H. 21. E. 1.* in the river *Severn*; *Tr. 28 E. 3 Rot. 29*. in the river *Leigh*; and generally in all other rivers within the bodies of countries, which had common passage of boats or barges, whether the water were fresh or salt; the king's or a subject's.

Sometimes by special commission, as for the river of *Leigh*.

And sometimes by the parties that were prejudiced by such nuisance, without any process of law.

But if any person at his own charge, makes his own private stream to be passable for boats or barges, either by making of locks or cutts, or drawing together other streams: and hereby that river, which was his own in point of propriety become now capable of carriage of vessels; yet this seems not to make it *juris publici*; and he may pull it down again, or apply it to his own private use. For it is not hereby made to be *juris publici*, unless it were done at a common charge, or by a public authority: or that by long

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continuance of time it hath been freely devoted to a public use. And so it seems also to be, if he that makes such a new river or passage doth it by way of recompence or compensation for some other public stream that he hath stopped for his own conveniency; as in the case of the *Abbott of St. Austens, Canterbury*, mentioned in the *Register*. So likewise, if he purchaseth the king's charter to take a reasonable toll for the passage of the king's subjects, and puts it in use; these seem to be devoting, and, as it were consecrating of it to the common use. As he that by an *ad quod damnum*, and licence thereupon obtained, changeth a way, and sets out another in his own land; this new way is thereupon become *juris publici* as well as a way by prescription. For no man can take a settled or constant toll even in his own private land, for a common passage, without the king's licence.

#### CAP. IV.

*Concerning the king's interest in salt waters, the sea and its arms, and the soil thereof; and first, of the right of fishing there.*

Thus much concerning fresh waters or inland rivers, which, though they empty themselves mediately into the sea, are not called arms of the sea, either in respect of the distance or smallness of them.

We come now to consider the sea and its arms: and first, concerning the sea itself.

The sea is that which lies whithin the body of a county or without. That arm or branch of the sea, which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least, may be within the body of a county; and, therefore, within the jurisdiction of the sheriff or coroner.

The part of the sea which lies not within the body of a county, is called the main sea or ocean.

The narrow sea, adjoining to the coast of *England*, is part of the *wast* and *demesnes* and dominions of the King of *England*, whether it lie within the body of any county or not.

The king's right of propriety or ownership in the sea and soil thereof, is evinced principally in these things that follow.

1st. The right of fishing in this sea, and the creeks and armes thereof, is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the *wast* whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river.

But though the king is the owner of this great *wast*, and as a consequence of his propriety, hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of *England* have regularly a liberty of fishing in the sea or creeks or armes thereof, as a public common of piscary; and may not, without injury to their right, be restrained of it; unless in such places, creeks or navigable rivers, where either the king or some particular subject, hath gained a propriety exclusive of that common liberty.

2d. The next evidence of the king's right and propriety in the sea, and the arms thereof, is his right of propriety to

The shore ; and

The *Maritima Incrementa*.

(1.) The shore is that ground that is between the ordinary high water and low water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea, and the shore of the arms of the sea.

And herein there shall be these things examinable.

1st. What shall be said the shore, or *littus marus*.

2d. What shall be said an arm or creek of the sea.

3d. What evidence there is of the king's propriety thereof.

1. For the first of these ; it is certain, that that which the sea overflows, either at high spring tides, or at extraordinary tides, comes not, as to this purpose, under the denomination of *littus marus* ; and consequently, the king's title is not of that large extent ; but only to land that is usually overflowed at ordinary tides. That, therefore, I call the shore, that is between the common high water and low water mark.

2. For the second ; that is called an arm of the sea where the sea flows and reflows ; and so far only as the sea flows and reflows ; so that the river of *Thames*, above *Kingston*, and the river of *Severn*, above *Teokesbury*, &c. though there they are public rivers, yet are not arms of the sea. But it seems that although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in *Thames* above the bridge. [Doug. 444.]

3. For the third ; it is admitted that *de jure communi* between the high water and low water mark doth *prima facie* belong to the king, 5 *Rep.* 107. *Constable's case*. Dy. 326. Although it is true, that such shore may be, and commonly is parcel of the manor adjacent, and so may be belonging to a subject, as shall be shown, yet *prima facie* it is the king's.

And as the shore of the sea doth *prima facie* belong to the king, viz. between the ordinary high water and low water mark, so the shore of an arm of the sea between the high water and low water mark, belongs *prima facie* to the king, though it may also belong to a subject, as shall be shown in the next chapter. [He mentions here two cases, of a number of houses claimed by or in right of the king ; in which it was adjudged that the claim was good because they were built between high and low water mark, where the tide flowed and reflowed ; the one case arising upon the river *Tyne*, the other upon the *Thames*.]

And this shall suffice for the king's right in the shore of the sea, or rivers that are arms of the sea, viz. the land lying between the high water and the low water mark at ordinary tides.

(2.) The king hath a title to *maritima incrementa*, or increase of land by the sea ; and this is of three kinds, viz. 1. Increase *per projectionem vel alluvionem*. 2. Increase *per relictionem vel desertionem*. 3. *Per insula productionem*.

1. The increase *per alluvionem* is, when the sea, by casting up sand and earth, doth by degrees increase the land, and shut itself out further than the ancient bounds went ; and this is usual. The reason why this belongs to the crown is, because in truth the soil, where there is now dry land,

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was formerly part of the very *fundus maris*; and consequently belonged to the king. But indeed if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse et non apparere*; the land thus increased belongs, as a perquisite, to the owner of the land adjacent.

2. The increase *per relictionem*, or recess of the sea. This doth, *de jure communi* belong to the king; for, as the sea is parcel of the wast or demesne; so, of necessity, the land that lies under it; and therefore it belongs to the king when left by the sea; and so also it regularly holds in lands deserted by a river, that is an arm of the sea or a creek of the sea, *prima facie*, especially if the creek or river be part of a port.

*Cur. primi*, upon an information against *Oldsworth* and others, for that which is now called *Sutton Marsh*, that 300 acres of land was *relictum per mare*, and that the defendants had intruded into it; the defendants pleaded specially, and entitled themselves by prescription to the lands project by the sea; and upon a demurrer adjudged against them. That 1st. by the prescription or title made to lands project, which is *jus alluvionis*, no answer is given to the title of information for lands relict, for these were of several natures. 2. It was held, that it lies not in prescription to claim lands relict *per mare*; for so if the channel between us and *France* should dry up, a man might prescribe for it, which is unreasonable; for

*Nihil prescribitur nisi quod possidetur.*

But this hath found some exceptions, besides these that follow in the ensuing chapter.

If a subject hath had by prescription, the property of a certain tract, or creek, or navigable river, or arm of the sea, even while it is covered with water, by certain known metes or extent; this, though it should be relicted, the subject will have the propriety in the soil relicted. For he had it before, though covered with water; and although the sea is a fluid, yet the *terra* or *solum subjectum* is fixed; and by force of a clear and evident usage, a subject may have the propriety of a private river; though the acquiescence of the former be more difficult, and requires a very good evidence to make it out, as shall be said in the ensuing chapter.

If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety; and accordingly it was held by *Cooke* and *Foster*, M. 7. Jac. C. B. though the inundation continue forty years.

If the mark remain or continue, or extent can reasonably be certain, the case is clear.

3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process



of time, grow firm land environed with water; and thus some places have arisen and their original recorded, as about *Ravensend* in *Yorkshire*.

And thus much of the king's right of propriety which he hath in the sea; and also *prima facie* and in common presumption, in the ports and creeks and arms of the sea.

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Mr. *Butler*, in his note [205] to *Co. Lit.* 261, a, considers *Ld. Hale* as having exhausted the subject upon which he treats; and had this great man followed out his doctrine of private rivers, with its various consequences and illustrations, as fully as he has done his doctrines of the sea and its arms, very little would have been left for our courts to do in filling up the outline. As his positions are, however, more general in respect to the former, while at the same time, they are of more extensive application, they have been oftener the subject of discussion in our courts; and would seem to call for farther notice.

The general policy and excellence of his doctrines have been the most fully and ably vindicated in *Connecticut* and *New-York*. "A more perfect system of regulations on this subject," (says *Ch. J. Swift*, 2 *Con. Rep. N. S.* 483,) "could not be devised. It secures common rights, as far as the public interest requires: and furnishes a proper line of demarcation between them and private rights." This doctrine, says *Hosmer, J.* "promotes the grand ends of civil society by pursuing that wise and orderly maxim of assigning to every thing capable of ownership, a legal and determinate owner." These remarks are followed up and vindicated by *Spencer*, late *Ch. Justice*, in *Hooker v. Cummings*, (20 *John.* 101.)

The general distinctions, deemed of so much excellence and importance by these learned judges; and which, at this day no lawyer will hazard his reputation by controverting, are, *that rivers not navigable, that is, fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent, to the extent of their land in length. But that rivers where the tide ebbs and flows, belong of common right, to the state. That this ownership of the citizen is of the whole river, viz. the soil and the water of the river; except, that in his river where boats, rafts, &c. may be floated to market, the public have a right of way or easement.* In a special manner where the subject claims under a grant from the state, bounded by a river not navigable, this grant extends *usque filum aquæ*; as was held in *Hayes's exr. v. Bowman*, (1 *Randolph's Rep.* 420, *per Cur.*), *Claremont v. Carlton*, (3 *N. H. Rep.* 369, *S. P.*) and *Lunt v. Holland*, (14 *Mass. Rep.* 149.) This was also admitted by the attorney general, it will be recollected, in arguing the principal case, (*ante*, 534.)

The only question that can generally arise between the citizen and the state, as to the ownership of rivers above the tide, is, whether the former be owner of the soil adjacent, within the meaning of *Hale*.

As to this question; there is certainly no technical or particular mode of expression in the grant, necessary to make him so. In the case of the river *Bonne*, (*Duv.* 153) it is said, in every river not navigable, "the *tertenants* on each side have an interest of common right;" and so is the abbreviation of that case in 2 *Roll. Abr.* 170, *pl.* 14, which was edited by *Hale*. By *Holt*, 12 *Mod.* 510, "If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is

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next his land." By Lord *Mansfield*, in *Carter v. Murcot*, (4 Burr. 2164,) "In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides: and it generally extends *ad filum medium aquæ*."

The proposition for the citizen to establish, then, is that he is the owner, *tertenant*, or *proprietor* of the soil adjacent to the river above the tide; and then, of common right, he owns the river.

1. *Owner, tertenant or proprietor.*] No doubt this may be either in fee or of any particular estate, of an equitable or legal estate; and the ownership of the river shall be co-extensive in estate, as well as territory. This was held in the principal case, (ante, 518.)

2. *Of the adjacent soil.*] Adjacent, (in Lat. *adjacens ab adjaceto*), is defined lying close, bordering upon. The Lat. verb means, to lie contiguous, or border upon, to abut, adjoin. Thus an assize stated by *Hale, De Jur. Mar. ch. 1*, is "quia dicunt, quod omnes, qui tenent terras *ABUTTANTES* super aquam illam, in ea piscantur pro voluntate sua usque filum aquæ." &c. This was of the *Idell*, a fresh water stream; and upon this there is no difference in the cases. All agree that where a man's land *abuts* upon or *adjoins* to any river above tide water, he owns the river to the centre of the stream. As long ago as 1805, in *Palmer v. Mulligan*, it appearing that the defendant owned the shore of the Hudson as low down as *Stillwater*, this being above tide water, *Thompson, J.* and *Kent, C. J.* applied to his case the doctrine of *Ld. Hale*, that his ownership extended to the centre of that great river; and the latter then hinted at what is now established, that if the state will bound a grantee upon a river not navigable, he shall hold to the centre, *unless there be an exception of the river in the grant.* (Vid. 3 *Caines*, 319.) In *Adams v. Pease*, (2 *Con. Rep. N. S.* 481,) the plaintiff owned a large farm bounded east on *Connecticut river*, above the flowing of the tide; but where it was large, and passable with flat-bottomed boats of from 5 to 30 tons burthen; and sometimes vessels built above had been floated down; yet held that the boundary, in terms, on the river, carried the plaintiff's ownership of the river to its centre. The rule is there laid down by *Swift, Ch. J.* that the adjoining proprietors have this right. The doctrine of this case was approved in its full extent, by the supreme court of this state, in *Hooper v. Cummings*, (20 *John.* 91) where it was applied to *Salmon river* which empties into lake *Ontario*. *Spencer, Ch. J.* who delivered the opinion of the court, says, "If the soil on both sides be owned by an individual, he has the sole and exclusive right; but if there be different proprietors on each side, they own their respective sides, *ad filum medium aquæ*." And the court approved what *Kent, C. J.* said in *Palmer v. Mulligan*, touching the Hudson being private property as low down as *Stillwater*. They also show that the cases which hold the contrary in *Pennsylvania* are founded on a repudiation of the common law. (Vid. also 17 *John.* 209, 10, &c.) In *Arnold v. Mundy*, (1 *Halst. N. J. Rep.* 1) the plaintiff's land ran to, or was bounded on a river where the tide did ebb and flow; and he and those under whom he claimed, had staked off and planted a bed of oysters, some of which the defendant took away; for which the action was brought. At the trial, the defendant's counsel moved for a nonsuit; and the judge in giving his opinion remarked, (*id. p.* 10) "that a grant of land to a subject or citizen, bounded upon a fresh water stream or

river, where the tide neither ebbs nor flows, extends to the middle of the channel of such river ; but that a grant bounded upon a navigable river, or other water, where the tide does ebb or flow, extends to the edge of the water only, that is to say, to high water mark, when the tide is high, and to low water mark when the tide is low ; but it extends no farther ;" and he nonsuited the plaintiff upon this distinction. On a motion to set aside the nonsuit, the supreme court, after a very learned argument, confirmed the distinction ; and refused to set aside the nonsuit. The Reporter, in his marginal note, has set down this as one resolution of the court : " A grant of land bounded upon a fresh water stream or river, where the tide neither ebbs nor flows, extends *ad filum aquæ* ; but a grant bounded upon a navigable river extends to the edge of the water only." In *Claremont v. Carlton*, (2 N. H. Rep. 369,) lot no. 46 was admitted, at the trial, to be bounded south on *Sugar river*, above tide water ; and an island lying on the north side of the river was held to pass by the grant, which was by the government of *New-Hampshire*. The river and island were held to pass upon the principles adopted by lord *Hale*, whose doctrine is recited at length and approved by the court. In *Hayes's exr. v. Bowman*, (1 Randolph's Rep. 417,) the words of the grant were, "lying on the west side of south river, and bounded by the same." This was where the tide did not flow. The court say, "where the commonwealth, having title to lands lying on both sides of a watercourse not navigable, grants the lands lying on one side thereof, and bounded thereby, it is universally admitted that such grant carries with it the title to a moiety of the watercourse. There can be no reason assigned why this rule, so just in relation to grants by the commonwealth, should not equally apply to conveyances by individuals." And they held that a moiety of the bed of the stream passed. In the case of *King v. King*, (6 Mass. Rep. 496,) it appeared that *Benjamin King* was seised of two tracts of land, opposite to each other, on the east and west sides of *Sheepscut river*, and adjoining thereto, conveyed to him by boundary lines which included a part of the river where it passed over falls and formed a site for mills. And it was held that even this specific boundary could have no effect in excluding the remainder of the river. The court say, "*Benjamin King* was entitled to two tracts of land, situate on the east and west sides of *Sheepscut river*, described and conveyed to him by boundary lines which include a part of the river ; and of course, by the legal operation of his title, the falls and bed of the river, with all permanent water privileges, wherever the river flowed between the tracts of land conveyed, or covering any part thereof." (id. 498.) *King* having died so seised, his heirs made partition by deeds, the import of which was an assignment of two parcels on the western side to his son *Moses* ; and of that on the eastern side to his son *Peter*. The court say, "the legal operation of this partition and assignment is, that the falls and bed of the river, and the water privileges were alike divided and assigned, as parcel of the two tracts ; which, after the partition, were to be considered as separated, so far as they lie opposite to each other upon the river, by a central line, or the thread of the river, as it is sometimes expressed." This was evidently decided as will be seen by

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the conclusion of the sentence, on the authority of *Hale's* doctrine, though he is not formally cited. In *Jackson v. Louw*, (12 John. 252,) the line ran south to the *Plattekill*, above tide water: thence up the same, to the south west corner of a lot this day conveyed to the said *Abraham Louw, jun'r*. The court say, (p. 255,) "the terms 'up the same,' necessarily imply that it is to follow the creek, according to its windings and turnings; and that must be in the middle or centre of it. The rule is well settled, that when a creek, not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be so run." In *Lunt v. Holland*, (14 Mass. Rep. 149,) the plaintiff derived title from a grant of the commonwealth, thus: "A certain tract of land lying in the township numbered one, in the county of *Cumberland*, which was surveyed and laid out in April, 1789, by *Samuel Titcomb*, and is bounded as follows, to wit, beginning at a hemlock tree standing by the south side of the river *Androscoggin*, thence south, &c. to another hemlock tree also standing by said river, thence south-eastwardly, and bounding by said river to the first mentioned bound," &c. The plaintiff claimed an island of 30 acres, the river running each side of it, lying between the two hemlock trees, and nearest the shore of the plaintiff's grant. One question was, whether, as *Titcomb's* survey included the island, it did not pass to the plaintiff for that reason, the survey being referred to by the grant; and the court held that it did. But another question directly raised and passed upon was, whether the boundary by the two hemlock trees, one mentioned as standing on the south side of the river, and the other as standing by the river, would not in construction of law, extend into the centre of the stream on the side of the island farthest from the line running between the two trees. *Fessenden*, for the defendant, upon this point, contended, that the island was excluded by visible and known monuments. "Bounding by the river," must intend that edge of the river on which the hemlock trees stood; or those trees could not be any part of the boundary. The judge, at the trial, charged that "land granted as bounded by a river, is held to extend to the thread or channel of the river; and as here were two channels, it might well be presumed the intent of the parties to the conveyance, that the grant was intended to extend to that channel which would include the island." The court, in delivering their opinion at bar, say, "land granted as bounded by a river extends to the thread of the river, unless from prior grants on the other side of the river, such a construction is negatived; and in this case, the channel on the farther side of the island may well be considered as intended by the description in this grant." This case was very strong for the state. The line along the river was limited nominally to two trees on the same side of the stream. One of these trees might not have touched the river at all. Yet upon the principles of *Hale*, these marks are departed from, the river itself adopted as the boundary; and the line extended over, and made to exclude an island lying on the side of the river nearest to it. We have before seen that this very point was adjudged in *Claremont v. Carlton*, (3 N. H. Rep. 369,) upon a boundary which was in terms on the river. But there were no definite monuments to restrain and bind it down to the margin of the stream. *Lunt v. Holland*, decides that a line running between two trees, one stand-

ing by the side of, and the other by the river, is a bounding or abutting on the river; that the grantee is, therefore, an adjacent owner, and his land extends, of common right *usque filum aquæ*. In *Harramond v. M'Glaughon*, (Tayl. Rep. 196,) it appears that a somewhat similar question arose in the superior court of law of North Carolina, in 1798. About 50 years before, the state had granted to the defendant, by patent, a tract of land, beginning at a hickory, standing not far from a river; and running thence down the river a certain course and distance; but the course ran obliquely from the river, leaving between it and the river a triangular piece of land. The state claimed this triangle, and in 1787, granted it by patent to the plaintiff, who brought ejectment. The court held that the river was the boundary of the first grant; and decided against the claim of the state. They say, "when a deed, patent or grant, describes a boundary from a certain point down a river, creek, or the like, mentioning also course and distance; should the latter be found not to agree with the course of the river, creek, &c. it ought to be disregarded, and the river considered the true boundary." The expressions used to designate the boundaries and extent of grants upon the Mississippi are, *tant d'arpents de face*, or *tant d'arpents face au fleuve*, or *tant d'arpents face sur le fleuve*; and these expressions, when thus unqualified, have, without a single exception, been considered as giving the grantee a boundary on the river. (5 Hall's Law Journal, 120.) Did the common, instead of the civil law apply to the Mississippi, no doubt such grants would give title to its bed *usque filum aquæ*. As to a boundary on the margin of a creek or river, as stated of that in the principal case, (ante, 518) it seems to be the very dividing line between the water and the land, the line touching both. It is synonymous with *shore*, which Parsons, Ch. J. says, in *Storer v. Freeman*, (6 Mass. Rep. 439,) when applied to the sea, "must be understood to mean the margin of the sea in its usual and ordinary state. Thus, when the tide is out, low water mark is the margin of the sea; and when the sea is full, the margin is high water mark." In analogy, to the margin of the sea, it would seem that the margin of a fresh water river or creek must be the ordinary water mark. "The shores of a river border on the water's edge." (5 Wheat. 385.) And then it would be more than splitting hairs; it would be splitting mathematical lines, to separate the boundary from the river. According to this definition, the relators were literally and mathematically adjacent owners within Hale's doctrine. In *Storer v. Freeman*, (id. 438,) one boundary was to the shore of the neck; thence by the shore of the neck; another was to a heap of stones at the shore of the neck, at W. E.'s corner so called, thence by the shore, &c. This was where the tide ebbs and flows; and Parsons, Ch. J. seems to take it for granted, that such boundaries, if upon a stream above tide water, would have carried the ownership, *usque filum aquæ*, as being a boundary on the water. He accordingly goes on to draw a distinction between the two cases. He says, "by the common law of England, which our ancestors brought with them, claiming it as their birthright, the owner of land bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common right; but if his land was bounded on the

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sea, or an arm of the sea, where the tide ebbcd and flowed, he could not, by such boundary, hold any land below the ordinary low water mark, for all the land below belonged, of common right, to the king."

Thus explore the books of the common law, wherever that law prevails: And in no case as between sovereign and subject, except the principal one, has it ever been questioned, that where a grant, either actually or constructively, goes to the water's edge, the grantee is the owner to the centre of the river, if it be above tide water. Lastly, he is the owner

*Of common right.*] It will be remembered that this phrase continually occurs in *Hale*, and in the decisions which follow him. It is an important, an emphatic part of the proposition with which we set out; and has been defined, in its general sense, by the greatest writer in law; and by one very little his inferior, as to the particular sense in which it is used by *Hale*. First, I quote from Lord Coke, who explains its use by *Littleton*. (*Co. Lit.* 142. a.) "'De common droit,' of common right; that is, by the common law; so called, because the common law is the best and most common birth right that the subject hath, for the safe guard and defence, not onely of his goods, lands and revenues, but of his wife and children, his body, fame and life also. So as the meaning of *Littleton* in this particular case is, that the lord may distreine for his rent of common right, that is, by the common law, without any particular reservation or provision of the party. And it is to be observed that the common law of England sometimes is called *right*, sometimes *common right*, and sometimes *communis justitia*. *Littleton*, in this his treatise, nameth *common droit* sixe times." Thus, within the sense given by Lord Coke, the party whose grant bounds him by any words on a river, or its margin above tide water, owns of course, without any express provision in the grant *usque filum aquæ*. The right is incident and annexed by law to his grant, the same as a right of distress to a rent service of which Lord Coke is speaking. In the notes to *Co. Lit.* by *Hargrave & Butler*, the latter, (note 205 to p. 201. a.) speaking of *Hale De Jur Mar.* says, "That where, in enquiries of this kind, it is said that a person is entitled to the right, or property in question, by *common right*, but that it may belong to another, it is intended to say, that the right or property in question is, by the common law, annexed to the particular capacity of the party, or to some property of which he is the owner; yet that it is not so inseparably or inalienably annexed to this capacity of ownership, but that the party may transfer it to another."

Thus where one owns the shore of a river above tide, by grant from the state; the common law (*common right*) annexes to his capacity as owner, the right of soil in the river *usque filum aquæ*. And it has often been said by our courts, that the only way in which this right of soil in the river can be withheld from the subject, is by a reservation express or implied. This doctrine as I before remarked (*ante*, 544,) was hinted by the sagacious Kent, the chief justice of the supreme court, in *Palmer v. Mulligan*, (3 *Caines*, 319.) And it was afterwards directly advanced by the court in *Claremont v. Carlton*, (2 *N. H. Rep.* 371, 372.) It is there said this exception may be by the acts of the parties, or an express provision in their conveyances. So in *Hayes's exr v. Bowman*, (1 *Kendolph*, 420, cited an-

le, 545,) the court say, "If it be the wish of the grantor not to convey the bed of the stream, or of any part thereof, it is easy for him to exclude it, by the use of words proper for that purpose. In the absence of such words, the moiety of the bed of the stream passes by such conveyance." So in the principal case, (ante, 528,) the supreme court lay down the same doctrine. And all the various expressions running through the books and cases, such as *of common right, by operation of law, or by construction of law*, mean the same thing; that the law carries the owner of the bank to the centre, unless otherwise expressed; and then *expressum facit cessare tacitum*. An exception may sometimes be implied, as where the river, or an island in the river, was previously granted. (14 *Mass. Rep.* 151.) Thus in *Hatch v. Dwight*, (17 *Mass. Rep.* 289,) E., in 1807, mortgaged a strip of land including mills, and running a considerable distance along a river; but in 1810, having sold a small piece of the mortgaged premises, for a hide mill and lime vats, he obtained a grant, or rather release from the mortgagee, for a nominal consideration; of what he (E.) had sold; described thus: *beginning at the end of a dam; running up the river two rods, and so round, to the bank of the river*. The mortgagee afterwards having foreclosed, one question was, whether the grant or release gave a right to the centre of the river; and it appeared that if it was to have this effect, it would destroy the value of the mortgagee's mill privileges. For this, and other reasons, it was held that it should not extend beyond the bank. The various reasons assigned by the court were, that the grant or release was limited to the bank; that there were no general words showing that a right to keep up a dam, was intended to pass; that the consideration was nominal; and it was not to be inferred that the mortgagee intended to release every thing valuable in the mortgaged premises, for which she had given a large consideration. The court considered the release, under all the circumstances, as being no more than a mere exception in the mortgage. There were various and special circumstances in the case, which led the court to infer that the parties intended to limit the release or grant to the bank. And in conclusion they say, "Without doubt, by our law, the owner of land extending to the bank of a river, will own to the middle of the river, if it be not navigable, and so public property. But the owner may sell the land without the privilege of the stream, as he will, if he bounds his grant by the bank." They continue, "the description in the release very clearly excludes any part of the stream; and as before observed, there are no general words of a more extensive signification." This case was between individuals, and must undoubtedly be referred to its peculiar circumstances. The court admit that an owner to the bank of a river, owns the river; but immediately say that he may bound his grant by the bank, and the stream will not pass. This must evidently mean a bounding by reservation, or plain exclusion express or implied. Otherwise the expression would be inconsistent in itself, and incompatible with all principle and all the cases. It is plain that the naked circumstance of bounding a grant on, to or by a bank, cannot exclude the stream, any more than bounding on the margin of the stream itself; and this the court admit; for certainly, owning "to a bank," is no more than owning on or by a bank. It is farther evident that this case

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does not rest on the particular words of the release, from the circumstance, that the reporter has not mentioned in his marginal note or index, any point as being settled or countenanced by this branch of the case. He doubtless looked upon it as a case entirely *sui generis*, in this respect; and as depending on numerous circumstances, which might never again conspire. Indeed, it is not readily perceivable how the case can, in this branch of it, ever be a guide for any other. Another singular circumstance is, that the court should rely on *Storer v. Freeman*, (6 *Mass. Rep.* 435,) for the only general doctrine which they appear to lay down. The question presented by that case was, as to the extent of a grant bounded upon the *sea shore*. In the case of a river not navigable, every possible intendment is in favor of the grant going to the centre; whereas, in case of the sea, the intendment is directly otherwise. *Jackson v. Halstead*, (5 *Conn.* 216,) was also a question between individuals. It was conceded that the *Delaware* was private property; but, as remarked by the learned counsel for the relators in the principal case, (ante, 531,) the question was not raised as to the constructive extent of the grant. Probably it could not arise. *Palmer*, the common source of title, owned the whole river; and in his grant, so far as it related to the river, had used words which would convey a mere right of fishery; and nothing more. It would have been subverting the express intention of the parties, to have allowed the usual constructive operation to the grant. It was the same thing in respect to the river as if the grantor had retained both shores, and granted in terms a mere fishery within the water. Had the grantor stopped at the words which bounded the grantee upon the river, beyond all doubt the soil would have passed *usque filum aquæ*; (12 *John.* 252; 1 *Randolph*, 417; 2 *Con. Rep. N. S.* 481; *Tayl.* 196;) and so would the island, had it lain on the grantee's side of the stream. (2 *N. H. Rep.* 369. 14 *Mass. Rep.* 140.) It was not thought worth while, even to inquire which side of the river the island lay. The decision turned wholly on the legal effect of granting a river by its name.

I am sensible that I owe the profession an apology for the length of this discussion, and its verbal and minute criticisms. But the amount involved is neither verbal nor minute. It was stated by the counsel of the appraisers, (ante, 523,) to be \$100,000, on the line of the canals alone. Take the whole state with its immense inland waters; and it gives an aggregate of millions. Probably there is hardly a patent in the state which grants the bed of a stream by name. I am informed that our patents have generally selected these streams as the best and most convenient limits for their grants, and are abutted or bounded upon them by different words; leaving it to the common law to say what portion of the stream passes, accordingly as the boundary may be above or below tide water. Our considerable rivers and creeks are covered with hydraulic machinery, and other establishments, depending for their value and their existence on the doctrine that these patents carry the ownership of the grantees to the thread of the stream. What more usual description of parcels than a line running to a given point on a creek or river; and then along the same as it winds and turns, for many miles? It is speaking within bounds, to say

that, adopting the construction contended for by the appraisers, would subvert individual claims to millions of property, the private ownership in which, has never before been doubted. The prerogatives of the state, set up by the appraisers, are not limited by a criticism upon the word *margin* as in the case of the *Chitteningo*. They claim as public property, every stream above tide water where a raft or a small boat can be navigated, unless that stream has been granted *in terms* by the state. They claim not merely a right of passage or highway for the people: that is conceded by the common law; but a *right of soil in the state*. Several instances of this kind have occurred.

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Ex parte GEO. TISSITS, Oct. term, 1826.

In this case it appeared that a valuable waterfall of 12 feet in the middle sprout of the *Mohawk*, which falls into the *Hudson* between *Van Schaick* and *Greene* islands, had been destroyed by a dam erected for the use of the canal. That the tide never ebbs and flows at the fall. This fall was granted, in terms, as so much land covered with water, May 5, 1792, by *Stephen Van Rensselaer* to *Jacobus Van Schoonhoven*; and had come by mesne conveyances to the relator; there being an actual individual seisin of the fall *eo nomine* for upwards of 30 years. It is well known that the land on both sides of the fall was granted away at a very early period by the state, which had not afterwards asserted the least claim.

The appraisers refused to allow the relator any damages, on the *sole ground* that the land under water belonged to the state.

The supreme court granted an alternative mandamus, in this case, against the appraisers, at the time they decided *Jennings'* case.

J. P. Cushman for the relator.

The following case came under the review of the supreme court, on appeal from an appraisal by the canal commissioners. It related to a valuable landing or *depot* for lumber on the river *Hudson*, which was inundated and destroyed by the colossal dam at *Fort Edward*:

Ex parte WALTER and CHARLES ROGERS. *Utica*, August term, 1825.

The affidavit of one of the owners stated, that 21 acres at *Deadman's point*, above the dam, and lying adjacent to the *Hudson* river, had for many years before the erection of the dam, been used as a landing ground for lumber, yielding an average income to the two proprietors, (to whom it had been devised by their ancestor,) of about 400 dollars annually. That it had been rendered nearly useless as a landing, from the time when the canal commissioners commenced the dam at *Fort Edward*, for a feeder to the northern canal, in the summer of 1821; and when the dam was completed in the summer of 1822, the landing was inundated, and the buildings removed. That the canal commissioners, Messrs. *Young and Seymour*, had appraised the damages in March, 1825, at only 630 dollars. And they informed the deponent, "that they estimated the land inundated, for the purpose of tillage, without reference to its value as a landing ground, at 30 dollars per acre." That the value of the land consisted almost en-

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tirely of its advantages as a lumber yard, which were destroyed by the dam. It appeared that a copy of this affidavit and notice of the appeal had been served on Mr. Young, who did not controvert the truth of the affidavit.

On motion to set aside this appraisal, the single point stated, (and it was stated and discussed in writing,) was, that the commissioners should have allowed the value of the premises destroyed as a landing. It was argued that this was its value to the owners; this would have fixed the price in market, which would obviously have been about \$6000, instead of \$630. The latter was but little more than the income for a single year. The motion was not opposed by the commissioners; but the court, as was their course on all appeals from these appraisals, took the papers, examined the question, and set aside the appraisal; deciding that it should have been according to the value as a landing ground.

I was afterwards informed by Mr. Young, that he had acted in awarding such small damages, on the principle that the soil of the Hudson at the place in question, though far above tide water, belonged to the state.

With deference, this was evidently adopting a new rule, unknown to the common law. It was not only adopting a new rule; but it was carrying that rule, in its application, one step farther than it ever can be carried. Admitting the more despotic rule of the civil law: "*Flumina autem omnia, et portus, publica sunt: ideoque jus piscandi omnibus commune est in portu fluminibusque;*" (*Just. Lib. 2, tit. 1, s. 2;*) the conclusion drawn by the canal commissioners, would, by no means, follow. The common law, so applied, would authorize them, in the prosecution of their splendid works, to cut up or inundate the valuable lumber yards at Troy, Albany or New-York, and then to pay, instead of their value as lying on a public stream, the price which they would fetch in market, as wheat fields, meadows, &c. according to their agricultural value. Their value arises from their local situation and advantages, their worth in market; and the revenues derivable from them are to be taken into the account. (*The Schuylkill Navigation Co. v. Thoburn, 7 Serg. & Rawle, 411. 1 Domat, 431, Of the restitution of fruits, 1, 2, 3.*) The state is bound to make restitution upon the same principle as an individual, who should commit the injury. (*1 Bl. Com. 141, 2.*) This is so even in more despotic countries; (*2 Montesq. L'Esp. de Lois, ch. 15;*) and the maxim, *sic utere tuo ut alienum non laedas*, applies with equal force to both. I do not, therefore, think that the decision of the supreme court, necessarily involved the question, whether the civil or common law should prevail. I do not believe they stopped to inquire whether the Hudson was a public or private river at the place in question. Such a point was not presented by the affidavit. This did not state whether the place was above or below tide water; nor was the point raised in argument. It is evident, therefore, that the court held the result to be the same, upon both the civil and common law.

On the case coming before the present appraisers, the question whether the Hudson, at the landing, was private property, was again raised, as will be seen by the case which they drew up, with a copy of which I have been favored. It is in these words:

In the matter of CHARLES & WALTER ROGERS.

"They claim title to a tract of land lying within the bounds of the *Kayaderosseras* patent, which was granted on the 2d Novr. 1708; bounded as follows: 'thence easterly or northerly to the third falls on *Albany* river,' [*Baker's Falls* on the *Hudson*. 1 John. 156.] 'about 20 miles, more or less; thence along the said river, down southerly, to the northeasterly bounds of *Saratoga*,' &c.

About 21 acres of that tract lie on the west margin of the *Hudson* river, and about 1-2 a mile above the dam at *Fort Edward*. A part of the tract, before the dam was built, was used as a place on which to deposit lumber, for the purpose of rafting and floating it down the river; and which produced an annual revenue to the claimants, as they allege, of \$400 or \$500; but which, since that dam was built, is rendered totally useless for that purpose; the dam having destroyed the navigation of the river to that place, and covered the land with water about 27 feet deep.

The place in question is about 40 miles above tide water; and much farther above where the water becomes fresh. There is no natural and continued navigation up the river to the land which is the subject of this claim.

On the 15th April, 1771, 62 years after the grant of the *Kayaderosseras* patent, the British government made a grant to *Henry Stilson*, the subject of which is described as follows: 'All that certain tract of land, ground and soil, under and covered with the water of *Hudson's* river, in the county of *Albany*, within our province of *New-York*; beginning on the west bank of the said river, at the division line between lot No. 7 and lot No. 8, in the 19th allotment of the *Kayaderosseras* patent; and runs thence into the river, east 3 chains, then parallel to the said bank of the said river, at 3 chains distance, south 13 degrees east, 1 chain and 60 links, and south 30 degrees east, 5 chains and 60 links, then west 3 chains and 65 links to the bank of the river; and then along the said bank, as the same doth wind and turn, northward to the place of beginning, containing 2 acres; together with all and singular, the benefits, liberties, privileges, waters, water-courses, mills, mill dams, easements, emoluments, tenements and hereditaments whatsoever,' &c. [*Book of Military Patents*, No. 2, p. 379, 590.]

The questions are, 1. Are the claimants entitled to the value of this land, according to its increased value by means of the use and unobstructed navigation of the river, as it was before the dam was built; or are they only entitled to its value for agricultural purposes?

2. Are the claimants entitled to pay for their fishery, which has been destroyed by the dam?"

Now, there is no doubt, upon the cases before cited, that the boundary "to the falls, and thence along the river down southerly," &c. to which the 21 acres in question extend, will, *per se*, carry the right of soil in the claimants to the thread of the *Hudson*. (12 John. 252, 255. 14 Mass. Rep. 149. 2 Con. Rep. N. S. 481. 2 N. H. Rep. 369.) Of course, the exclusive right of fishing goes to the same extent. (20 John. 90.)

The only argument against this construction is the little 2 acre military patent to *Stilson*. Now, had this been granted before the *Kayaderosseras* patent issued, and had it been a part of the identical bed of the river cov-

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ered by the 21 acres, it must be admitted that, within what the court say in *Lunt v. Holland*, (14 *Mass. Rep.* 151) it would have operated as an exception from the *Kayaderosseras* patent, *pro tanto*. But clearly not, being as it is, *subsequent* to the issuing of the *Kayaderosseras* patent. The very point was adjudged in *Harramond v. M'Glaughon*, (*Tayl. Rep.* 196.) This little river patent lies 8 or 10 miles below the 21 acres. It was a void grant. The *very two acres* had before passed by the great patent of *Kayaderosseras*; and so far from being an argument of contemporaneous construction, this little thing could not have sustained itself upon its own ground, had it been attacked in season by the patentees of the *Kayaderosseras*.

It will be seen, by the above sketches, that the board of canal appraisal, and the regular and ordinary tribunals of the country, have, in their respective adjudications upon the right annexed to riparian ownership, begun at different points. The former, in effect, have begun at the *civil law*; the latter at the *common law*. And even when both have assumed the *civil law* as the starting point, they have diverged to directly opposite conclusions. The rules which the former have deemed it their duty to adopt, are most unfavorable to the rights of private property. Those by which our courts of justice have been guided, are more favorable, because dictated by the benign spirit of the common law. If the former be right, a large sum of individual suffering and ruin must be the consequence. With the utmost deference to that very able and respectable board, we must be permitted to doubt the soundness of their legal positions, when we see them overruled by the decisions of the high superintending jurisdictions of our country; and especially when we see those decisions so plainly supported by the sainted doctrines of a *Hale*, a *Holt* and a *Mansfield*.

END OF OCTOBER TERM.

CASE,
BEFORE WOODWORTH, J.

IN VACATION AFTER OCTOBER TERM, 1826.

Ex parte VERMILYEA and others.

ON application to Mr. Justice WOODWORTH, in behalf of *Vermilyea and others* for the allowance of a certiorari, to remove into the supreme court the record of their conviction, from the court of oyer and terminer of the city and county of *New-York*, his honor deeming the question of too much importance to be disposed of without giving the counsel for the people an opportunity to be heard, directed notice to be given to the district attorney of the city and county of *New-York*. Notice having been given accordingly, the questions presented were argued before the judge at his chambers, in *Albany*, on the 22d and 23d of December, 1826, by

A. Spencer and *B. F. Butler*, for the application, and

Talcott, (attorney general,) contra.

His honor afterwards discussed the questions at large; and gave his opinion as follows:

WOODWORTH, J. The defendants were convicted at a court of oyer and terminer, held in the city of *New-York*, reasonable ground for doubt, the judgment will be suspended till the opinion of the superior court be known.

But a challenge for principal cause, forms a part of the record; and to review this, a certiorari will lie in a criminal cause; and a writ of error in a civil cause.

Otherwise of a challenge to the favor.

A challenge for principal cause may be demurred to, or issue may be taken upon it.

Where the facts are admitted and referred to the court, this is, in substance, a demurrer; and should be entered on the record as such.

If a juror have expressed an opinion against the party, though from his knowledge of the cause, and not from any favor or ill will; yet this is a principal cause of challenge.

So, it seems, if his opinion be grounded on the information of those who are acquainted with the facts. Otherwise, where his opinion is grounded on mere rumour.

A certiorari removes the record only.

In criminal cases, doubts upon the admission or legal effect of testimony, cannot be brought before a superior court by certiorari, or writ of error.

A bill of exceptions is inapplicable to a criminal cause; and in such causes the admissibility, or legal effect of testimony, can be examined in a superior court, only on a report or case agreed upon; the presumption being, that where there is rea-

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of a conspiracy to defraud certain incorporated companies and individuals, of their goods, chattels and effects. Application is now made for the allowance of a certiorari, to remove the record and proceedings into the supreme court, for the purpose of reviewing the decision of the court below, on a challenge taken to some of the jurors ; and also on the ground of a fatal variance between the proof offered at the trial, and the charges contained in the indictment. As to the latter, I will merely observe, that a certiorari removes the record only ; and as the evidence produced on the trial forms no part of the record, the writ would be a nugatory process. In criminal cases, where questions of law arise at the trial, either as to the admission of testimony, or its legal effect when admitted, if doubts are entertained, the facts are brought before this court in the form of a report, or case agreed on. If the objections afford reasonable ground for doubt, the presumption is, that judgment will be suspended until the opinion of the superior court be known. As far as I know, questions of this description have always been submitted to the supreme court in that manner. The experience of half a century has not called for any legislative provision to vary this course of practice ; nor am I aware that complaints have ever been made, that the exercise of this discretion has been rigorous as respects the accused. On the contrary, it will be found that the cases from inferior tribunals, which have been reviewed, furnish no inconsiderable evidence of the solicitude and tenderness of our courts, in allowing even to the greatest culprits the benefit of every legal objection.

If, however, in any given case, the inferior court should erroneously refuse to interfere, it would afford no ground for a certiorari ; because the remedy does not apply to, or reach the error sought to be corrected.

If a bill of exceptions would lie in a criminal case, the difficulty would be removed ; but it is well settled that it does not.

With respect to the admission of the jurors, I will confine my observations to the case of *Andrew S. Norwood*.

From the affidavits and certificates of the clerk, it appears that Mr. *Norwood* was challenged for the principal cause ; and the decision of the challenge referred to the court, without any objection on the part of the district attorney. The specific ground of the challenge was not in the first instance stated. The juror testified, that he had heard all the evidence given on the former trial, having been present at it ; that he had made up his opinion perfectly, on the evidence, that the defendants were all guilty ; and had frequently expressed his opinion to that effect. Upon being inquired of by the district attorney, he stated that he felt no bias or partiality against any of the defendants ; that if the testimony given on this trial should appear as it did on the former, he should certainly find the defendants all guilty ; and added, that he thought he felt competent to give a verdict according to his oath, and the evidence as it should appear.

The court decided that the juror stood indifferent ; and that the challenge was not true. He was accordingly sworn and sat on the trial.

On this evidence, two questions arise ; *first*, whether the challenge forms a part of the record, so as to be the subject of removal by certiorari ? *Second*, whether the exception to the juror was well taken ?

The first question depends on this ; do the facts constitute a principal cause of challenge ? This arises when there is a manifest presumption of partiality. In that case it excludes the juror ; but a challenge to the favor, where the partiality is not apparent, must be left to the discretion of triers. The facts relied on generally consist of slight circumstances, respecting which, the law has not laid down any certain rule. In such cases the judgment of the triers is conclusive. The question arising on such a challenge, is altogether extrinsic of the record. Evidence may be reviewed in a superior court by demurrer, or bill of exceptions ; but neither applies to evidence in support of a challenge for favor.

The next inquiry is, whether a principal cause of challenge may become parcel of the record, and under what

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circumstances? If it cannot in any case, it is unnecessary to consider the objection taken to the juror.

It is laid down in 3 *Bac. Ab.* 766, that "if a challenge be taken, and the other side demur, and it be debated, and the judge overrules it, it is entered upon the original record; and if at nisi prius, it appears upon the postea what the judge hath done; but if the judge overruled the challenge upon debate, without a demurrer, then it is proper for a bill of exceptions." *Chitty*, 1 vol. *Cr. L.* 548, recognizes the same doctrine. He refers to *Skin.* 101, and *Hut.* 24. *Chitty* also says, at the same page, that if a demurrer be resolved on, either to the array or to the polls, there is no occasion for those circumstances which must attend a demurrer to a plea, such as the signature of counsel; but it is good as soon as agreed on at the bar, and the prothonotaries ought of right to enter it on the record. These authorities suppose a principal cause of challenge; and establish the proposition, that where the facts alleged as cause of challenge, are not disputed, the question is decided summarily by the court. On the argument before me, the attorney general conceded the law to be, that if the challenge was good for principal cause, and the other party demurred, it became parcel of the record, and might be removed. He contended, however, that this was not a challenge of that description; that the facts made out a challenge for favor; and that the judge was substituted in the place of triers by consent of parties; and consequently that the question was to be viewed in the same manner as if it had been actually decided by the latter.

If it should turn out that the defendants have not established a principal cause of challenge, the argument is well founded. The real difficulty, if any exists, is, in ascertaining whether the public prosecutor is to be considered as having demurred to the challenge. The proceedings in this stage, were somewhat informal. The more regular course would have been, to have stated, in the first instance, the facts relied on for cause. The prosecutor would then probably have elected to plead or demur. It seems, however, that the juror was challenged without

specifying the cause, and the question referred to the court. What was referred to the court? The juror was examined; there was no dispute about facts. When that happens in the case of a principal challenge, as well as in that for favor, triers are appointed. The court were called upon to pronounce the law; to decide whether the facts made out a principal cause of challenge; or, in other words, whether they were sufficient to exclude the juror. I admit, if the facts were only proper to be submitted to triers, in support of a challenge for favor, the defendants are concluded by the decision of the judge; but if, *per se*, they formed a principal cause, they may avail themselves of it as such. A demurrer is an admission of the fact, submitting the law arising on that fact to the court. On a demurrer to a challenge, no strict technical form seems to be required. Have not both parties conceded, that the testimony of the juror was true? and have they not called on the court to declare the law arising on that testimony? Will it be denied that this is in substance a demurrer? or will it be gravely contended, because the party may not have said in terms, he demurred to the challenge, but submitted to the court whether it was sufficient, in point of law, that, therefore, a substantial difference exists between the two cases? that the one shall be entered on the record, and shall be subject to review, while the other is final and conclusive? I cannot persuade myself, that the rights of any party are held by such a tenure; and particularly in a criminal case, where there is no remedy by bill of exceptions. I am, therefore, of opinion, that the judge having been called upon to decide whether the challenge was valid in law, it is, in substance, the same as if the party had demurred in express terms. If viewed in the light of a demurrer, it becomes parcel of the record, and is liable to be removed by certiorari. That the counsel for the defendants considered the decision on the challenge as subject to the revision of a superior tribunal; and did all that was deemed necessary to secure that right, is apparent from the fact alleged in the affidavit of Mr. Hoyt, who says, that the defendants' counsel requested

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the court to take down the testimony as to the competency of the jurors, in order to give the parties the benefit of reviewing the decision; and that the presiding judge, upon such request, read over the notes of evidence, and corrected the same in some particulars, on the suggestion of the defendants' counsel.

It is, however, contended, that this case falls within that part of the doctrine laid down by *Chitty* and *Bacon*, where it is said, that if the challenge is overruled without demurrer, on being debated, the objection may afterwards be made the subject of a bill of exceptions; and as no bill was taken, the decision could not be brought before the supreme court, unless by consent. It seems to me, this rule does not apply in criminal cases. Whether the counsel demurs to the challenge, or merely argues that it is not good in law, creates no material distinction. If the distinction was ever entertained in the English courts, it must have been founded on a belief that a bill of exceptions would lie. But if it be a conceded point, that no bill of exceptions will lie, I think it goes far to show that the rule laid down is not applicable to criminal, but civil cases. I have traced the doctrine to its source, by examining the cases cited by *Chitty*. They are to be found in *Skinner*, 101, and *Hul.* 24. The case from *Skinner*, was decided 35 *Cha.* 2, between the king and the city of *Worcester*. It was an information in the nature of a *quo warranto*. The case states, that the counsel for the city of *Worcester* came with their bill of exceptions; they challenged the array, because the venire was returned as by both the coroners; when, in truth, but one of them returned it. They likewise challenged the polls, for want of freehold, which was overruled. No question was raised, whether a bill of exceptions would lie. *Saunders*, chief justice, said, if the judge overruled the challenge upon debate, without a demurrer, then 'tis proper for a bill of exceptions. There are several answers to this case. It was not strictly a criminal proceeding. Informations at the common law, partook of the nature of a civil remedy, and, in modern times, are considered as a civil remedy only. It must, I

apprehend, have been so considered by the court ; otherwise, a bill of exceptions would not have been suggested. This is evident from the fact, that prior to the 35th of *Charles 2*, the judges in England had expressed an opinion on this point.

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In the case of sir *Henry Vane*, reported in *Keling*, 15, and 2 *St. Tri.* 435, 450, 1, 14 *Car.* 2, a construction is given to the statute ; and it was held by all the judges, that the statute of *Westm.* 2, c. 31, which gives the bill of exceptions, extends only to civil causes, and not to criminal. *Keling* states, that the court agreed, the words of the statute are plain as to this point. So also, 1 *Keb.* 324, where the same case is reported, the judges observe, a bill of exceptions is not within the statute, or ever heard of, the statute not extending to any indictment. This case having been decided before the case in *Skinner*, it is manifest the court had no reference to criminal proceedings, when speaking of a bill of exceptions, as applicable to a challenge, disposed of without demurrer. As a civil remedy, it may undoubtedly be pursued, if there is no demurrer to the challenge in form ; but even then, in a civil case, its necessity may well be questioned, as will presently be shown. The case then leaves the principle untouched, that where the judge decides the law on a principal challenge, whether arising on demurrer, or by a submission of the question, an entry is made on the record, which may be reviewed.

The decision in *Skinner*, upon which *Chitty* and *Bacon* rest, is an authority to prove there is a remedy, where a good cause of challenge is overruled. It is an admission of this principle. The public prosecutor cannot be compelled to demur. Shall his refusal or omission deprive the accused of a right ? Can the right depend on such a contingency ? I think not. In accordance with this view of the subject, it seems to me the case of *Hesketh v. Braddock*, (3 *Burrows*, 1847,) decided on a writ of error, proceeded. The record states that the defendant challenged the array, to which the plaintiff demurred ; the challenge was disallowed. The defendant then, *ore tenus*, in open

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court, challenged the polls, because the jurors were citizens and freemen of the city of *Chester*. The challenge was disallowed; and thereupon the issue was tried and a verdict found for the plaintiff. The court of king's bench considered the validity of the challenge, and passed upon it, as parcel of the record. There was no suggestion by the court or counsel, that the challenge to the polls was improperly brought up. The challenge to the polls was not demurred to; but it was disallowed. On what principle did it become part of the record? Manifestly because the decision of the court upon it was substantially the same, as if a demurrer had been filed in form.

In 3 *Wood. Lec.* 347, n. (i), the form of the record in the case from *Burrows* is given. The challenge to the polls is thus entered: "And hereupon the said S. B. *ore tenus*, in open court, challengeth the polls, because, he says, that the jurors are citizens and freemen of the city of *Chester*; which said challenge by the court here is disallowed." Professor *Woodeson* then states, that the challenge *ore tenus* was omitted in the first engrossment of the record; that the defendant alleged diminution; and that it was then inserted by rule. This case sanctions the doctrine contended for by the defendants' counsel, that the challenge may be removed as parcel of the record, provided it was a principal cause of challenge.

The only remaining question is, whether the facts stated by the juror constituted a principal cause of challenge.

It will not be denied, that every man, whether in a civil or criminal case, is entitled to an impartial jury. Though our constitution merely preserves the trial by jury inviolate forever, and does not, in express terms guarantee an impartial jury; yet, *ex vi termini*, it is embraced in its provisions: as much so, as that the judges shall be impartial men. The same general principle is adopted by the English law. The only question is, as to the application of that principle. Can a juror be impartial or indifferent to the question, who, from a knowledge of the facts, confesses that he has made up his mind that the accused are guilty? It is a fallacy to suppose such a man stands impar-

tial, merely because he has no malice or ill will against the defendant. This doctrine, however, has been strenuously urged; and cases have been cited, to show that the law is so understood in *England*.

In the case of the *King v. Emonds and others*, (4 *Barn. & Ald.* 470,) chief justice *Abbott* observes, that expressions used by a jurymen, are not a cause of challenge, unless they are to be referred to something of personal ill will towards the party challenging. He relies on the doctrine laid down in the year books, 7 *Hen.* 6, fol. 25, where *Babington*, justice, says, "if the juror has said he will pass with the one party, for the knowledge that he has of the matter, and of the truth, he is indifferent; but if he has said so for any affection of the party, he is favorable." *Hawkins*, B. 2, ch. 43, s. 28, is also referred to. He observes, "that it hath been allowed a good cause of challenge, that the juror hath declared his opinion before hand, that the party is guilty, or will be hanged, or the like." *Hawkins* adds, "yet it hath been adjudged that if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge." The opinion of the court of king's bench, in *Barn.* and *Ald.* rests on these ancient authorities; it does not profess to consider the soundness of the doctrine advanced. Now, admitting the law had been so applied at an early day, when the prisoner did not possess even the right of producing testimony; I apprehend that after the lapse of centuries, when the rights of parties are better understood, and have been more accurately defined, it would not be presumption to inquire whether the common law relating to the right of challenge, had not in this instance been misapplied; or whether it was consistent with the law as laid down by lord *Coke*, who says, "the rule of law is, that the juror must stand indifferent as he stands unsworn." (*Co. Litt.* 155, b.) It seems to be admitted in some of the old cases, that an opinion formed and expressed, is good cause of challenge. Upon what is this founded? On the supposition that it creates a bias. All experience goes to prove

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the infirmity of human nature is such, that we cannot at pleasure get rid of preconceived opinions. The question is not how great is the bias, but does any exist? The least is sufficient to exclude. Can the source from whence it is derived be material? As to the accused, it is the same thing, whether the bias proceeds from a preconceived opinion, or malice and ill will. Be it either, he is equally affected. Why then superadd the necessity of proving malice or ill will? Without it, the parties do not contend on equal ground; by requiring it to be proved, in order to exclude the juror, it only shows the disparity to be greater. If the question were entirely novel, I should think our courts would incline to take a different view of it. But it has occurred here, and has been well considered. The supreme court decided in the case of *Blake v. Millsbaugh*, (1 John. 316,) it was good cause of challenge to a juror, that he had previously given his opinion on the question in controversy between the parties. The case of *Durell v. Mosher*, (8 John. 445,) is not contradictory. There, the juror said, if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right. No definite opinion was expressed or formed. The court so adjudged; and observed that the declaration was hypothetical. It is no more than saying, if the defendant has done an illegal act, let him answer for it; which is no evidence of partiality. In the case of *Pringle v. Huse*, (1 Cowen, 432,) a juror was challenged for having expressed an opinion against the plaintiff. It was held that this was a principal cause of challenge, and should be tried by the court; and that the juror challenged, might be called as a witness. In the case of *Coleman v. Hagerman*, the same principle was adopted by the supreme court. The late chief justice *Spencer* has furnished me with a manuscript opinion of his, in that cause. It was an action for an assault and battery of an aggravated character. The verdict was for \$4,000 damages. The grounds of the motion were, that *Graham*, one of the jury, had made use of language, indicating an opinion that the defendant ought to be exemplarily punish-

ed. It appeared that *Graham* was wholly unacquainted with the parties until after the trial; and that the opinions expressed by him were founded on newspaper publications. He swore that he had no bias against, or partiality for either of the parties, and personally knew nothing of the assault and battery complained of: yet the court unanimously awarded a new trial, on the ground that *Graham* did not stand indifferent, "in consequence of the opinions he had expressed. In the manuscript opinion referred to, the late chief justice stated the principles adopted by him, on the then recent trial of *Van Alstyns*, for the murder of *Huddleston*. It was thus: if a person had formed or expressed an opinion for or against the prisoner, on a knowledge of any of the facts attending the murder, or from information of those acquainted with the facts, he considered it good cause of challenge; but if the opinions of the jurors were formed on mere rumors and report, he decided that such opinions did not disqualify the jurors; and, as I understood, the opinion delivered on that solemn occasion, met the decided approbation of the supreme court.

The principle upon which these cases were decided, is, that an opinion formed and expressed by a juror, is of itself evidence that he does not stand indifferent between the parties. I do not perceive how the case before me can be distinguished. On the trial of *Fries* for treason, before Judge *Iredell*, on an application for a new trial, one question was as to the competency of a juror who had expressed himself in strong terms as to the prisoner's guilt. That learned judge put the question on this ground: that when a predetermined opinion is formed, from whatever motives, it creates an improper bias, extremely difficult to get rid of; and may influence an honest man unwarily to give a wrong verdict: that he becomes less able to discriminate facts. The reasoning of chief justice *Marshall*, on the trial of *Col. Burr*, vol. 1, p. 370, 419, is directly in point. He has shown in the most satisfactory manner, that a juror who has given his opinion, cannot be consider-

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ed impartial; that the natural tendency of preconceived opinions in a juror, is to obstruct the impartial administration of justice. He asks, why a distant relative, or he who has prejudices, cannot serve on a jury? Because he is presumed to have a bias. He may declare that, notwithstanding, he is determined to listen to the evidence, and be governed by it; but the law will not trust him. The chief justice observes, "Is there less reason to suspect him who has prejudged the case, and deliberately formed and delivered an opinion upon it? The law suspects, and not without reason, that he will listen with more favor to that testimony which confirms, than to that which would change his opinion. It is not to be expected that he will weigh evidence or argument, as fairly as a man whose judgment is not made up in the case." These enlightened views place the question upon the true ground; not whether the juror feels resentment or ill will; but whether for any cause, he has a bias on his mind that may disqualify him from deciding with strict impartiality. I entirely concur in the reasoning of that case, as containing a luminous exposition of the ground upon which the rule is founded.

The result of my opinion is, that enough has been shown to render the decision in the court below questionable; that the challenge forms a part of the record; and that the defendants are entitled to the allowance of a certiorari.

Certiorari granted.



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF NEW-YORK,**

**IN FEBRUARY TERM, 1827, IN THE FIFTY-FIRST YEAR OF  
 OUR INDEPENDENCE.**

**MYERS against FOSTER.**

ON error from the C. P. of *Schenectady* county, where the cause came by appeal from the justices' court of the city of *Schenectady*.

*Myers*, a collector on the *Erie* canal, sued *Foster* for \$25, the penalty given by the 17th section of the act for the maintenance and protection of the *Erie* and *Champlain* canals, (*sess.* 43, *ch.* 202.) This section requires that every boatman, or person having charge of property moving on the canal, shall give to the collector, &c. a just account or bill of lading, &c. signed by the person, &c. conveying such property, &c. containing a statement of the weight of all property on which toll is charged by the ton, &c. and the number and feet of other articles, &c. a statement of the place from which the property is brought, and where the same is intended to be landed, &c. ; and on default in any of these particulars, that the boatman, &c. shall forfeit and pay the penalty of \$25. The 20th section authorizes the canal commissioners to establish the rates of toll to be paid on all articles conveyed, &c. and to erect toll houses and weighing scales. The 23d section gives an action for all penalties to the collector, &c.

The canal commissioners have no right to levy a toll upon passengers on the *Erie* and *Champlain* canals, within the *stat. sess.* 43, *ch.* 202, s. 17 & 20.

But the act was amended, and extended to persons, by the statute of April 12th, 1827. Vid. note (a) at the end of this case.

A penal statute is not to be extended by an equitable construction.

*Foster*, the defendant, being master of a freight boat, cleared from *Albany*, with property and four passengers,

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having paid toll for the property, as established under the 20th section. He afterwards took in one and an half passengers at *West Troy*; and at *Schenectady*, offered to clear the passengers, with 3 1-2 more passengers taken on board at the latter place, (making in all, the number of 8,) to a place about 5 miles above the city, which was done, the defendant furnishing a bill of lading accordingly. 6 1-2 of the passengers were discovered by agents, (whom the plaintiff had employed to watch,) continuing their passage on the boat about ten miles above *Schenectady*; and it was for the falsity of the bill of lading, in this respect, that the action was brought.

On these facts being proved in the C. P. the plaintiff rested; and the defendant moved for a nonsuit, on the ground that no toll could be assessed on passengers, by the canal commissioners; *passengers* not being *property*, to which alone the act extended; and that no assessment on passengers was proved.

The plaintiff then offered in evidence, an establishment of toll, on passengers over 12 years of age by number, and under that age by weight, to be estimated at 75lbs. each; signed by *Stephen Van Rensselaer*, *Samuel Young*, *Henry Seymour* and *Wm. C. Bouck*, the canal commissioners, who claimed in making the assessment, to act under the 20th section.

This evidence was rejected by the C. P. who nonsuited the plaintiff. He excepted; and brought error to this court on the bill of exceptions.

*N. F. Beck*, for the plaintiff in error, conceded that passengers were not mentioned specifically by the act as a subject of toll; but he contended that the intent and object of the legislature was to levy a compensation upon every person, as well as upon all property transported upon the canal. Though *persons* are not within the terms, they are certainly within the reason and equity of the act.—The transportation of passengers occasions the same injury to the canal, and works the same benefit and profit to individuals as the transportation of property.

*A. C. Paige*, contra, was stopped by the court.

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SAVAGE, Ch. Justice. The only question seems to be, whether *passengers* are *property*. No mention is made of *persons*, and there is not a word in the act from which we can infer that the legislature intended to make them the subject of toll. The law will not extend a penal statute by equitable construction.

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SUTHERLAND, J. It is impossible that this law could contemplate *passengers* as the subject of toll. There is nothing either in the sense of the words used, or in the context, to warrant the construction contended for. It would be extending a penal statute beyond what was ever heard or thought of before.

WOODWORTH, J. The judgment must be affirmed. This is a plain *casus omissus* in the act. The equitable construction contended for would be most extravagant; and is tolerated by no rule. It would be a total departure from the obvious meaning of the legislature.

Judgment affirmed.(a)

(a) By the act passed April 12, 1827, amendatory to the one in question, the right is given to tax *persons* as well as *property*, passing on the canal.

#### ROOT against KING and ANOTHER.

THE defendants having made a case upon which to move for a new trial, and the plaintiff having proposed amendments, in which he did not object to the charge of the circuit judge as set forth in the case made; both the draft of the case and amendments were sent to the judge by the defendant for the purpose of being settled. The judge proceeded to settle the case accordingly. He struck out the charge as inserted by the defendant, and substituted one according to his own notes and recollection; and

Counsel have a right to be heard on settling a case before a judge. A judge has a right to correct his charge as presented by a case, even though the parties may have agreed upon it.

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made corrections in the facts of the case, without regarding the time and place at which the defendant's attorney had noticed the case for settlement; and without either party being present. The judge certified to this court that it was his practice to settle cases without the counsel of the parties being present; and that he substituted a new charge in this case, because the one inserted by the defendants was unnecessarily prolix, and materially incorrect.

A motion was now made to refer the case to the judge for review.

*J. Blunt and J. Duer, for the plaintiff.*

*J. Sudam and E. Williams, contra.*

SAVAGE, Ch. J. Whatever course the parties may take in fixing on a judge's charge, to be inserted in a case, it is the right of the judge to see that it is correct. Neither the parties nor their counsel have a right, at their pleasure, to make out such a charge as will appear absurd or ridiculous. All they can require is, that the opinions expressed to the jury be substantially presented. But we think the judge erred in deciding that counsel should not be heard before him in relation to settling the case; and on this ground the motion must be granted.

SUTHERLAND, J. The charge is always subject to the correction of the judge, though the parties may agree upon it.

WOODWORTH, J. The correction may be made at any time; and we would even stop an argument on the certificate of the circuit judge that his charge had been perverted. His charge need not be inserted *in hæc verba*. The material parts alone are necessary. He should put into the case the substance of his opinion as expressed upon the law and the fact.

Motion granted.

In the matter of application of THE MAYOR, &c. OF  
THE CITY OF NEW-YORK, relative to extending and  
opening *Third Street*.

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Matter of the  
Mayor, &c. of  
New-York.

The report of the commissioners of estimate and assessment, in this matter, was confirmed at the last *August* term without opposition, owing to certain papers sent by Mr. *Simmons* to oppose, not arriving in season. Since that time, *Simmons* complaining to the corporation that his property had been assessed too high, they resolved, that if the supreme court should be of opinion that the assessment could be waived by the assent of the corporation, without impairing the validity of the proceedings, the counsel of the corporation should waive the assessment, so as to permit *Simmons* to be heard at this term.

*P. W. Radcliff* for *Simmons*, now moved that he be heard; and he cited *Matter of Dover street*, (1 *Cowen*, 74.)

*M. Ulshoeffer*, contra, said the confirmation was conclusive and could not be recalled; and he cited 20 *John*. 269; 7 *id.* 541; 6 *id.* 1; 11 *East*, 194; 7 *id.* 307; 1 *Gaines*' *Rep.* 510; 2 *Dall.* 409; 6 *John. Ch. Rep.* 49; 2 *R. L.* 414; *Act of April* 20, 1818, *sess.* 41, *ch.* 210; *Sess.* 42, *ch.* 202, § 1.

He said the proceedings can now be reviewed only on certiorari, upon the allegation that they do not conform to the statute. (20 *John.* 430. 1 *John. Ch. Rep.* 18. 7 *Wheat.* 218. 4 *John. Ch. Rep.* 352.)

The matter of *Dover street*, cited against us from 1 *Cowen*, was before confirmation.

*Radcliff*, in reply, urged the hardship of the rule laid down by some of the cases, which often subjected individuals to great losses; and relied on the consent of the corporation.

SAVAGE, Ch. J. The hardship of these corporation cases is a very common topic of remark when their proceed-

After confirmation of the commissioners of estimate and assessment, under the statute, (1 *R. L.* 413, s. 178,) there being no irregularity or surprise, the court will not open the matter, so that the merits may be considered, as to the wrongful assessment of an individual, even with the consent of the corporation.

The supreme court act, under the statute, as commissioners; not as a court; and a report once regularly confirmed is irrevocable, unless all the parties in interest consent.

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ings come before us ; but we have no power to give relief. The remedy lies with the legislature. We act as commissioners under a statute, declaring what we have once done to be conclusive. (2 R. L. 413.) Vested rights are acquired by third persons in virtue of what we do ; and the plain import of the statute and the cases cited is, that the report being once confirmed, becomes irrevocable, unless it be voluntarily waived by all parties concerned. We do not act as a court in these matters ; but as commissioners appointed by the legislature ; and such proceedings have been very aptly compared by the cases, to those of a commissioner or court of common pleas, under the insolvent act. (20 John. 272-3. 7 John. 546-7.) The consent of the corporation is nothing, unless it be accompanied with that of all the parties in interest. The corporation must collect the money assessed, and pay it over according to the statute. The case of *Dover street* is pressed upon us ; but that was before confirmation, and was a case of surprise. If not, the former cases were against it ; and we would take it back.

SUTHERLAND, J. In this case, the court have acted on the merits. It is not a case of irregularity, surprise or default.

*Per totam curiam,*

Motion denied.

#### THE PEOPLE *against* SCHUYLER.

It is felony for a man who elopes with another's wife, to take his goods, though with the consent, and at the solicitation of the wife.

THE defendant was imprisoned for, and convicted of grand larceny in stealing the goods of *L.* at the oyer and terminer for *Schoharie* county, *October 23d, 1826.* The cause came here on a certiorari, accompanied with a case.

The evidence in the court below was, that the prisoner eloped with *L.'s* wife in the night, carrying away with him certain household furniture or goods of *L.* secretly and unknown to *L.* The prisoner and *L.'s* wife having agreed to elope with an intention that she should live with him

as his wife, she told him of her intention to take the furniture. He at first declined taking any thing beside her wearing apparel; and said he would have nothing to do with the goods; but at her request, she saying the goods were her own, he assisted in placing them in a waggon when they started; and also assisted in carrying some of them out of the house. They afterwards lived together as man and wife in the state of *New Jersey*. The goods were taken with the intention of converting them to the use of the prisoner and *L.*'s wife; were under their joint control while they lived together; and afterwards, up to the time of the trial, under the control of the wife at her father's.

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*H. Hamilton*, for the prisoner, said this taking was clearly no felony in the wife; and therefore it could not be so in the prisoner. This is so laid down by *Hale*; and he is pretty uniformly followed by every subsequent writer on criminal law. (1 *Hal. P. C.* 514. 1 *Hawk. B.* 1, ch. 33, s. 19. 2 *East's Cr. L.* 558, s. 8. 2 *Chit. C. L.* 935. *Harrison's case*, 1 *Leach's Cr. Cas.* 47. *Dunl. N. Y. Justice*, 285. *Com. Dig. Justices*, (O. 6.) *Show. Rep.* 52, *Shower, arg.* 1 *Russ. on Crimes*, 26, 7. 2 *id.* 1130.) The wife is treated by these authorities, as having an interest in the goods; and it will be seen by them that the statute *West. 2, c. 34*, was deemed necessary to make the taking of goods with the wife against her will, felony.

*Talcott*, (attorney general,) contra. *Hale* is the foundation of the doctrine contended for; and the other writers profess to do no more than follow him. He relies on 13 *Ass. 6*, which relates to a prosecution on the statute of *Westm. 2, c. 34*, for stealing wife and goods. It could never be, that the mere fact of taking the wife with the goods, should mitigate the taking of the latter to a trespass. The crime is aggravated. The statute was evidently intended of those cases only, which were not felony at the common law. It referred to the taking of the wife and goods, and made both a single felony, which might be

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charged as such ; and then the statute was referred to in the indictment. Stealing the goods was felony at the common law. The statute created a new felony of which the ravishment was an ingredient. (2 *Inst.* 434.) This will also be seen by referring to the book cited by *Coke* and *Hale*. The place is a note to 13 *Ass.* 5, instead of being 6, as it is usually cited. *Br. Corone*, pl. 77, gives the same authority at length ; but neither he nor *Coke* draw any inference from it against the taking of the goods being in itself a felony. *Harrison's case*, (1 *Leach*, 47,) was where the wife had the exclusive possession of the goods by the consent of the husband.

But a note to *Hale* gives the doctrine of *Dalton* on this subject, which is in point for the prosecution ; and *Russell on Crimes*, 27, cited on the other side, follows *Dalton*, and pronounces his opinion a good one.

*Curia*, per SAVAGE, Ch. J. The prisoner took the goods secretly ; and no doubt with an intention to convert them to his own use ; but this was done by the consent and at the solicitation of the wife, who had agreed to elope and live with him in adultery. This is urged as reducing the offence to a trespass. So far as the question depends upon authority, we are left to the conflicting opinions of commentators, without any adjudged case in point. The statute of *Westm.* 13 *Ed.* 1, c. 34, is relied on, which enacts thus : " And of women carried away with the goods of their husbands, the king shall have the suit for the goods so taken away." This may mean an abduction with the consent, or against the will of the wife. If it be the latter, it strikes one as singular that such a circumstance should reduce an act, which would otherwise be a felony at the common law, to a mere trespass ; and that a statute should be necessary to restore it to its proper rank in the scale of crime. It is certainly more consistent with our present ideas on this subject, to suppose the statute an affirmation of the common law. *Hale* and other writers do not assert with any degree of confidence, that the consent of the wife, that the adulterer with whom



she elopes should take the husband's goods, will reduce the crime to a trespass. *Hale* puts the case by a *semble*, and is followed by some others. The idea may have grown out of a supposed interest which the wife has in her husband's goods; for it is said in some books, he endows her at the marriage with all his worldly goods. (*Russ. on Crimes*, 26, 7.) But I believe it is now universally received as law, that she can exercise no control over his goods except as his agent; and not in her own right. The husband may sell the goods or give them away, or bequeath them. Her interest is no more than that of a child. In both cases it is a mere expectancy; and in most cases, the delivery to a stranger by either would protect him from a prosecution for felony. He has reason to presume the consent of the parent or husband; and acts in good faith. On this principle, he would be a mere trespasser, though consent should happen to be wanting. We are happy to find that this is so upon authority. In *Dalton's Country Justice*, ch. 157, p. 504, *Nelson's ed.* it is said, "so if a man takes another man's wife, with her husband's goods against the husband's will, this also is a felony;" and again, "if a married woman shall deliver to her adulterer her husband's goods, this is a felony in the adulterer." In a note to 1 *Hal. P. C.* 514, the reason mentioned is, that "in such case no consent of the husband can be presumed." *Russell* approves of this doctrine, and the reason on which it is founded. (*Russ. on Crimes*, 27.) Here the adulterer did more than merely receive stolen goods from the wife. He assisted in stealing them, carrying some of them out of the house. He had no reason to presume the husband's consent to such a taking; and is plainly guilty of felony.

The court sentenced the prisoner to 3 years imprisonment in the state prison at the city of *New-York*, at hard labor.

Rule accordingly.

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v.  
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Wilcox  
v.  
Howland.

WILCOX *against* HOWLAND.

Copies of supplemental affidavits for a motion, must be served the same length of time before the day mentioned in the notice of motion, as is necessary for the service of copies of the principal affidavits

An excuse for not obtaining affidavits for a motion, till it is too late for noticing the motion for the first day of term, will warrant a notice for a subsequent day in term; but not a short notice.

N. P. TALLMADGE moved, in behalf of the defendant, for a rule to enter a suggestion on the record, entitling him to judgment for treble costs, on a verdict in his favor. The motion was founded on several affidavits, copies of which, with a notice of the motion, had been served on the plaintiff's attorney more than four days previous to the day for which the motion was noticed. This was the first day of term. Afterwards, and but two days before term, the copy of a supplemental affidavit was served on the plaintiff's attorney, with notice that it would be read as an additional ground for the motion; and the affidavit of serving the supplemental affidavit stated an excuse for not making an earlier service.

T. J. Oakley, contra, objected that the supplemental affidavit could not be read.

Curia. The supplemental affidavit cannot be received. The excuse would have warranted a notice of the motion for a subsequent day in term, but not a short notice. Copies of all supplemental affidavits must be served the same length of time before the day for which the motion is noticed, as is necessary for the service of the copies of the principal affidavits. The defendant's counsel may withdraw his papers and renew the motion at the next term.

Papers withdrawn.

ALBANY,  
Feb. 1827.Hooker  
v.  
Rogers.HOOKER *against* ROGERS.

CASE for publishing a libel. At the last *Washington* circuit, (*Nov. 14th*,) the defendant moved to put off this cause, on his affidavit that *J. L. Thurman* was a material witness for him, without whose testimony he could not safely proceed to trial, as he was advised by counsel and verily believed; that on the *11th of November*, he went to the house of *Thurman* for the purpose of subpœnaing him; but found him confined to his bed by sickness, and unable to attend court. The affidavit stated the same thing as to the materiality of two other witnesses, whom it stated to have been subpœnaed generally, without showing when; that neither had come to the court; and that the defendant expected to be able to procure the attendance of the witnesses at the next circuit.

The judge held this affidavit insufficient, and refused to put off the cause; stating that the defendant should have offered the plaintiff to take the testimony of the absent witnesses before some competent person. He gave time to obtain their depositions, which was not done; and *Thurman* died before the defendant reached his house for that purpose. The defendant appeared at the circuit by counsel, and contested the cause; and a verdict passed for the plaintiff.

A motion was now made in behalf of the defendant, to set aside the verdict, and for a new trial, on the above grounds.

*B. F. Butler* and *D. Russell*, for the motion, cited *Ogden v. Payne*, (5 *Cowen*, 15.)

*S. Stevens* and *H. Buell*, contra.

*Curia*. The affidavit was clearly sufficient; this being the first time the cause was noticed for trial. It now appears that *Thurman*, being since dead, cannot be had as a

A circuit judge should put off a cause, on the usual affidavit of the defendant, of the absence of a material witness, &c. at the first circuit, for which the trial is noticed, unless there be suspicion that the application for that purpose is intended merely for delay.

The affidavit need not state when the witnesses were subpœnaed, unless this be made ground of objection.

It is, in general, no answer to the application, that the defendant should have offered to take the depositions of sick or absent witnesses.

If the judge refuse to put off the trial for proper cause, the verdict will be set aside, though the defendant appear and contest the suit.

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v.  
Gauger.

witness ; but that is no answer. Had it been known to the defendant in season, he might have supplied his place by other testimony. It does not appear when the other witnesses were subpoenaed ; but the judge did not put his refusal on that ground. If he had done so, the defect in the affidavit, (if it is to be deemed one,) might have been supplied, and the service of the subpoena shown to have been in due season. Substituting an examination of the witnesses on interrogatories, for their personal attendance, might prejudice the defendant's rights. He was entitled, in strictness, to their personal attendance. We are not aware that this practice of making the want of an offer to examine witnesses on interrogatories the ground of refusal to put off a trial, has ever been allowed, unless perhaps in the case of transient or seafaring witnesses. The usual affidavit is enough on the first notice of trial, unless circumstances of suspicion appear in some way, inducing a belief that the application is intended merely for delay ; and so we have held not only in the case cited, but many others. We do not hesitate to say, that had either of us been holding this circuit, we should have deemed it our duty to put off the cause on this affidavit.

Motion granted.

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JACKSON, *ex dem.* COATES, *against* GAUGER.

The affidavit, on moving for a view, in ejectment, should show not only that boundaries are in question ; but the particular circumstances which render a view necessary to the understanding of the cause by the jury ; so that the court may judge whether the view be necessary.

S. A. FOOT, for the defendant, moved for a view ; and read an affidavit of the defendant's attorney, that on the trial of this cause, an intricate question of boundaries would be inquired into ; and the cause could not be tried by a jury understandingly without a view.

*J. L. Wendell, contra, cited 4 Cowen, 397.*

WOODWORTH, J. The affidavit is insufficient. By the statute, (1 R. L. 332, s. 21,) we may order a view when it shall appear proper and necessary. Several decisions have limited these views in ejectment to cases where boundaries are in question. (*Col. Cas. 46. 4 Cowen, 396.*) But this alone is not enough. Particular circumstances should be stated, in order that we may judge for ourselves, whether the view be necessary to a full understanding of the cause. The defendant here states merely his own conclusions.

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v.  
Seymour.

SAVAGE, Ch. J. In most cases, the evidence may be made quite as plain to a jury, in respect to boundaries, through proper surveys and diagrams, accompanied with the evidence of surveyors, and even more so, than by a view. We ought, therefore, to see that it is clearly necessary, before we subject parties to the delay and expense of this proceeding. The opinion of the party, or his attorney is not sufficient.

*Per totam curiam,*

Motion denied.

THE PEOPLE, *ex rel.* Jennings, *against* SEYMOUR, WOODS  
and SELDEN.

THE SAME, *ex rel.* Egleston, *against* THE SAME.

To the writs of alternative mandamus granted in these causes on motions reported, *ante*, 518, 520 to 536, the defendants now made separate returns; *Seymour*, that after inquiry, the appraisers came to the conclusion that the state had not parted with the land upon which the *Chitteningo* creek passes at the places claimed, &c. as set forth in his affidavit, and for the reasons stated by that affidavit, as mentioned in the report above referred to; *Woods*, that he had ever been of opinion that the claim of the relators to damages was legal and equitable; and that he was ready and willing to appraise; and *Selden*, that he had a

The owners of land adjoining a stream of water where the tide does not ebb and flow, own also the bed of the stream *usque flum aqua.*  
Peremptory mandamus granted on motion; the return to an alternative mandamus being insufficient.

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Jackson  
v.  
Smith.

claim for damages depending in some measure on the same principle with the claims in question in these causes; and had therefore declined to appraise; not deeming it prudent, under the circumstances, to act, until the other appraisers should agree, or the question should be otherwise settled. That the creek at the place in question is an inconsiderable fresh water stream far above tide water, and in no sense of the term navigable. That since the decision of this court, he was ready to appraise.

On filing these returns,

*S. L. Edwards*, for *Jennings*, and

*N. P. Randall*, for *Egleston*, moved for writs of peremptory mandamus.

*Curia.* These causes were before us at the terms of *August* and *October* last. We granted writs of peremptory mandamus at *August* term; but at *October* term changed the rule in each cause into one for an alternative mandamus, upon a suggestion that the appraisers wished to make special returns, and bring writs of error, should the decision here be against them. The facts which we have already twice passed upon, are not denied or questioned by the returns. We accordingly adjudge them insufficient; and grant writs of peremptory mandamus.

Rule accordingly.

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JACKSON, *ex dem.* HART, against SMITH.

A writ of error by a plaintiff in ejectment stays an attachment against his lessor, for non-payment of costs.

In ejectment. The verdict and judgment being for the defendant, he caused the costs to be taxed, and regularly demanded of the lessor of the plaintiff, the *9th* of *January* last; but they were not paid. On the *6th* of *February* thereafter, the plaintiff sued out and filed with the clerk of this court his writ of error; and put in bail in error.

A motion was now made, in behalf of the defendant, for an attachment against the lessor of the plaintiff, for not paying the costs.

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Ex parte  
Wallis.

This was opposed, on the ground that error had been brought.

*G. B. Throop*, for the motion.

*J. T. B. Van Vechten*, contra.

*Curia.* A writ of error stays execution, if brought before it is executed. It has the same effect upon an attachment against the lessor of the plaintiff, which is in nature of an execution. The motion for the attachment must be denied without costs.

Motion denied.

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*Ex parte WALLIS.*

D. B. TALLMADGE, moved to make the submission to arbitrators between the relator and *Holly* a rule of court; and for an attachment for not performing the award, which was in favor of the relator. Performance had been demanded.

An attachment for not performing an award on the submission being made a rule of court, cannot go till the rule be served and performance demanded.

*G. F. Tallman*, contra.

*Curia.* Take your motion to make the submission a rule of court. The application for an attachment is premature. That writ is founded on the idea that there has been a contempt of court in disobeying the rule. The party must, therefore, be served with the rule as in other cases, and obedience demanded; and then if it be not obeyed, an attachment goes on showing these facts by affidavit.

Rule accordingly.

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Wheeler  
v.  
Raymond.

SANDS *against* M'CLELAN.

ON demurrer to the plaintiff's declaration, this court gave judgment for the plaintiff, with leave to the defendant to withdraw his demurrer and plead, *on payment of costs*. The plaintiff not demanding the costs, or causing them to be taxed, the defendant filed a plea, and entered a rule to reply, which not being done, he entered a default.

*S. Sherwood* moved to set the default aside.

*E. Cowen*, contra.

*Curia*. The payment of costs was a condition precedent to the act of pleading. The defendant should have sought the plaintiff's attorney, and tendered the costs, or demanded a taxation, offering to pay on their being taxed.

Motion granted.

WHEELER *against* RAYMOND.

PROCEEDINGS will be stayed against special bail, pending a writ of error brought by the principal.

JUDGMENT was for the plaintiff, who proceeded to fix the special bail of the defendant; and brought a suit against them on their recognizance. The defendant then brought error, putting in bail in error. And now,

*Jas. Edwards*, for the defendant, moved to stay all proceedings against the bail, till the writ of error should be determined; and cited *Dunl. Pract.* 1139; *Tidd*, 471; 5 *Taunt.* 264.

*D. B. Tallmadge*, contra.

*Curia*. Take your motion, on paying the costs of the suit against the bail.

Motion granted.



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Lewis
v.
Ball.

LEWIS and LEWIS *against* BALL, late sheriff of Orange.

THE defendant, as sheriff of *Orange*, had been sued with his sureties; and a judgment obtained in favor of the people, for the penalty of the bond given for the faithful execution of his office, pursuant to the act concerning sheriffs, &c. (1 R. L. 418, s. 2, 6.) The suit on the bond was not prosecuted by the present plaintiffs; but by another, on application and leave granted pursuant to the 6th section of the act. An affidavit was now produced, showing that *Lewis* and *Lewis* had obtained a judgment for \$106,87, against *Ball* as sheriff, for a default within the terms of the bond; and issued an execution for a part of that judgment; which still remained unsatisfied.

The motion to issue further execution upon a judgment obtained against a sheriff and his sureties, on a bond given for the faithful execution of his office under the statute, (1 R. L. 431, s. 6,) should be on notice to the sheriff and his sureties.

The sureties are not liable beyond the amount of the penalty of the bond.

J. A. Collier, for the plaintiffs in this suit, now moved for a rule, that such sum be levied on the judgment in favor of the people, as should be sufficient to satisfy the judgment in favor of the *Lewises*; and that an alias *fi. fa.* issue for that purpose.

But notice of this motion had not been given to the sheriff or his sureties.

Curia. The plaintiffs show enough to entitle them to the rule applied for, in the first instance; but this may be answered by the sheriff and his sureties. It may be that there has been already levied, by execution against them, the full amount of the penalty. Notice of the application should be given, in these cases, to the sheriff and his sureties. They may be able to reduce the amount claimed; or show matter which would defeat the application altogether.

Motion denied.

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Cole
v.
Perry.

COLE *against* PERRY.

The statute relative to balloting for jurors, (*sess.* 49, *ch.* 309, *s.* 4,) is merely directory; and though it be violated, this is no ground for moving to set aside the verdict, unless the irregularity be objected to at the time, or there be some abuse or injury to the party moving.

J. L. VIELE, for the defendant, moved that the verdict rendered for the plaintiff in this cause at the last *Rensselaer* circuit, be set aside, on the ground of irregularity in drawing the petit jurors. He produced a certificate of the circuit clerk, stating that the names of the jurors summoned and empaneled at the circuit, were written on several and distinct pieces of paper, being all, as near as might be, of equal size; and put into boxes open at the top by an orifice of about five inches in diameter, from which they were drawn to compose the several juries. That they were not rolled or folded together. The counsel also produced an affidavit, showing that the names of the jurors were easily and distinctly visible to the person drawing. That the course was to draw the ballots from one box, and put them into another, till the drawing was through. He cited the statute, (*sess.* 49, *ch.* 309, *s.* 4.)

H. P. Hunt, contra, read an affidavit of the deputy clerk of the circuit who drew the jury, denying all abuse, and stating distinctly that he did not see the names till after they were drawn; and that no objection was made to the manner of drawing. He also read an affidavit of the plaintiff's attorney, showing that no objection was made by the defendant to the manner of drawing in this cause. He cited 1 *Dunl. Pr.* 675; 6 *Taunt. Rep.* 460; 5 *Coven*, 269; 1 *id.* 221; 2 *id.* 589; 3 *id.* 355; 3 *John. Rep.* 252.

Curia. The statute relied upon is merely directory to the officer drawing the ballots. We have often holden this in relation to statutes of a similar character. No abuse or injury to the defendant being pretended, and no objection made at the time, the mistake of the officer is not a ground for setting aside the proceedings.

Motion denied.

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Feb. 1837.Ex parte
Alvord.*Ex parte* ALVORD and others.

A JUDGMENT having been rendered by a justice of Livingston county, against *Alvord* and others, in favor of *Sherwood*, they appealed to the *Livingston C. P.*; but the condition of the appeal bond did not recite the amount of the judgment before the justice; nor did the amount appear in any part of the bond. The justice returned the amount of the judgment; and in a supplemental return, stated that no other suit had ever been pending or tried, between the parties before him; or any other judgment rendered before him against *Alvord* and others in favor of *Sherwood*.

An appeal bond must recite the amount of the judgment, before the justice. If not, the C. P. should dismiss the appeal for want of jurisdiction.

When the cause was called upon the calendar of the C. P. for trial, the counsel for *Sherwood* moved that the appeal be dismissed, on the ground that the bond did not sufficiently identify the judgment; and the court granted the motion.

A mandamus was now applied for, commanding the C. P. to vacate the rule dismissing the appeal, and proceed with the trial.

C. H. Bryan, for the relators.

Curia. We think the legislature intended that the bond should state the judgment below accurately and truly. They have not said so in terms; but one branch of their provisions on the subject is, that the appellant shall pay the judgment below in a certain event. (*Stat. sess. 47, ch. 238, s. 36.*) The judgment, therefore, should be stated, with the view to afford as complete a remedy as possible on the face of the instrument. In a suit upon this bond, to recover the amount of the judgment below, matter extrinsic must be averred and proved. The appellant must furnish a bond as perfect as possible for the purpose of a remedy to the appellee; or the common pleas do not acquire jurisdiction. The court were right in dismissing the appeal; and the motion must, therefore, be denied.

Motion denied.

ALBANY,
Feb. 1827.

Jackson
v.
Wood.

JACKSON, *ex dem.* WOOD and others, *against* WOOD
and HOPKINS.

After the consent rule in ejectment, the plaintiff must, before he can enter a default, serve a new or altered declaration.

EJECTMENT. The declaration and notice from the casual ejector were served on the 12th of *October* 1826 ; and consent rules exchanged between the attorneys of the parties on the 14th of the same month. On the 3d of *January*, 1827, the plaintiff's attorney, without serving a new declaration, entered the defendants' default for want of a plea. On the 1st of *January*, 1827, the defendants' attorney had sent to the plaintiff's attorney a stipulation to accept the declaration originally served in lieu of a new one, the names of the defendants to be inserted. On this stipulation a plea of not guilty was endorsed ; but, this not arriving till after the 3d of *January*, the plaintiff's attorney refused to receive it on the ground of having previously entered the defendants' default for not pleading. On the 6th of *February*, the defendants' attorney gave notice to the plaintiff's attorney, that common bail had been filed.

A motion was now made, in behalf of the defendants to set aside the default, and all subsequent proceedings, for irregularity ; and 1 *Dunl. Pr.* 381 ; 2 *John. Cas.* 110 ; *Col. Cas.* 120 ; and 3 *John. Rep.* 141, were cited.

S. M. Perkins and *H. Stephens*, for the motion.

D. Wood, contra.

Curia. No new or altered declaration has in this case been served. This is, in strictness, necessary. It has never been waived. The stipulation was not accepted. The default was, therefore, irregular ; and the motion must be granted.

Motion granted.

ALBANY,
Feb. 1837.Vary
v.
Godfrey.VARY *against* GODFREY.

ON certiorari to a justice's court. The affidavit on which the writ was allowed, was taken before the attorney for the plaintiff in error. On this ground, (and another,) it was now moved to set it aside as irregular. For the motion was cited, *Taylor v. Hatch*, (12 *John*. 340,) and *Munro v. Baker*, (6 *Cowen*, 396;) and against it, 5 *Cowen*, 38; 1 *Dunl. Pr.* 220; 1 *R. L.* 140, 396; 2 *Caines' Rep.* 182; *Laws N. Y. sess.* 47, p. 297, s. 43; 6 *John. Rep.* 334; 3 *Cowen*, 345; 2 *John.* 371; 2 *Cowen*, 500; 1 *Tidd's Practice*, 451; *Barnes' Notes*, 60.

The affidavit to obtain the allowance of a certiorari, may be taken before the attorney who commences the suit.

J. Crocker, for the motion.

H. Putnam, contra.

Curia. This affidavit does not come within the rule laid down in *Taylor v. Hatch*, (12 *John. Rep.* 340.) That applies only to affidavits made before an attorney in a suit pending; not to those preparatory to the commencement of one. The affidavit is not entitled; and the attorney may or may not be retained at the time when the affidavit is made. The rule is thus qualified by the English cases. (*Haward v. Nalder*, *Barnes*, 60.) The motion must be denied.

Motion denied.

ALBANY,
Feb. 1827.

Thomas
v.
Van Ness.

THOMAS, admr. of Hagerman, *against* VAN NESS and
OTHERS, heirs and devisees of Van Ness.

The plaintiff, by mistake, proceeded against heirs and devisees as joint debtors, within 1 R. L. 531, s. 13; the process being served on some of the defendants; against whom the plaintiff declared. The defendants served with process, demurred; upon which the parties agreed that judgment should be entered against the plaintiff on demurrer, with leave to amend on payment of costs, as if the cause had been argued and decided for the defendants on the demurrer; *held*, that the plaintiff might then bring in the other defendants on *simul cum* process; and declare and proceed against the whole.

THE defendants, were, by mistake, treated by the plaintiff as joint debtors; part being returned by the sheriff as taken; and part not found. He declared against those taken as implicated with the others. The defendants taken, demurred to the declaration specially; and the plaintiff joined in demurrer. This was before *Whitaker v. Young*, (2 Cowen, 569,) was decided. On learning this decision, the attorneys stipulated that judgment should be entered for the defendants on the demurrer, with leave for the plaintiff to amend on payment of costs, as if the cause had been argued and decided in favor of the defendants on the demurrer. This stipulation was filed, and a rule entered according to it; and the costs paid. The plaintiff then issued writs of *capias ad respondendum simul cum*; and brought in the other defendants, the other heirs and devisees. He then amended his declaration accordingly; and offered a copy with notice of the rule to plead to the attorney of the heirs, &c. first brought into court. This he declined receiving, on the ground that the amendment was not warranted by the rule.

This question (among others) between the attorneys was now submitted, by consent, to the court.

S. Cleveland, for the plaintiff.

Hooker and Radcliff, for the defendants.

Curia. An order made by this court, in the terms of the stipulation, would, we think, have warranted the amendment by bringing in the defendants not taken; and proceeding against them as the plaintiff has done in this instance. The plaintiff is, therefore, regular.

Papers returned to counsel, with the expression of the above opinion. No rule was entered.

ALBANY,
Feb. 1827.

WITHERWAX
v.
AVERILL.

JACKSON, *ex dem.* Rugbee and others, *against*
STILES, Gubert, tenant.

EJECTMENT. The declaration was returnable at this term. The tenant held under a demise from *Laussat* and *Bouchaud*; and sent them word, on receiving the declaration, that he should not defend; and that if they intended to protect the premises against the claim of the lessors of the plaintiff, they must attend to it; for he (the tenant) should not. On these facts,

In ejectment, the landlord may move to defend, at the term when the declaration is returnable; especially where the tenant has expressly refused to appear.

S. R. Hobbie, moved that the landlords be made defendants; and cited 1 *R. L.* 443, s. 29, 30; 1 *Cowen*, 135; 4 *John. Rep.* 492; 2 *Dunl. Pr.* 1022, 3; 4 *Taunt.* 520; *Adams on Eject.* 239, 240, and 361, *App. No.* 29.

S. Sherwood, *contra*, submitted whether the application was not premature; and said that before the landlord could be received to defend alone, judgment should be given against the casual ejector.

Curia. The tenant expressly refused to appear. This was enough. The landlord need not wait till a default is entered against him.

Motion granted.

WITHERWAX *against* AVERILL.

THE plaintiff declared on a judgment rendered in a justice's court. The defendant pleaded two pleas; 1. *nul tiel record*, and 2. *payment*.

A plea of *nul tiel record*, to declaration on a judgment in a justice's court, is not triable by the record, but by jury; and may be joined with a plea of *payment*.

J. L. Wendell, for the plaintiff, moved for a rule that the defendant elect which plea he would abide by.

E. Cowen contra.

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Feb. 1827.

Jackson
v.
Tuttle.

Curia. The ground upon which we compel a defendant to elect between a plea of *nul tiel record*, and other pleas, is, that their mode of trial is different; one being by the record, the others by jury. No such consequence follows here from retaining both pleas. The existence of a justice's judgment is not determinable at bar, by the record. It ranks as a specialty. (16 *John.* 233.) And the plea of *nul tiel record*, if it be good and capable of trial, in this case, must be tried by a jury.

Motion denied.

JACKSON, *ex dem.* Hills, against TUTTLE.

Declaration in ejectment amended by altering the time of demise; though the cause had been twice noticed for trial; and an objection taken on the trial that the time was laid too early; and a bill of exceptions signed on this point.

Amendment granted, on paying the costs of the motion.

EJECTMENT. The plaintiff's attorney had, by mistake, laid the demise in the declaration on the 1st day of *January*, 1822; whereas the title did not accrue to the lessor of the plaintiff till the 16th of that month. The cause had been once tried; the plaintiff nonsuited; and a new trial granted. On the second trial, (*October*, 1826,) the defendant objected, for the first time, that the demise was laid before the title accrued; and moved for a nonsuit. The judge overruled the objection, with a view to give the plaintiff a chance to move this court to amend. The defendant excepted; and the judge signed a bill of exceptions upon the point.

J. A. Spencer, now moved to amend the declaration and all subsequent proceedings, by inserting a day of demise subsequent to the 16th of *January*, 1822. He cited 2 *Coven*, 515; 4 *id.* 124, 394; 5 *id.* 265; 18 *John.* 265; *Anth. N. P. Rep.* 180; 7 *Cranch*, 472; 6 *Coven*, 360.

G. C. Bronson, contra, said the court had never gone so far as to amend a bill of exceptions; or to amend in any particular which should do away the effect of a bill of exceptions. If, however, an amendment is allowed, it should be, on paying the costs of the circuit.

Curia. We do not amend the bill of exceptions ; but we direct the declaration, and all the other proceedings subsequent, to be amended, on payment of the costs of this motion. As to the bill of exceptions, it will probably be rendered unavailing upon this point, by a return of the amended record to the court of errors.

ALBANY,
Feb. 1827.

Tillinghast
v.
King.

Motion granted.

TILLINGHAST *against* KING.

CASE for a libel, published in the *N. Y. American*.

J. Blunt, for the defendant, moved to change the venue from the county of *Erie* to the city and county of *New-York*, on an affidavit that the cause of action, if any, arose in the latter county ; but the affidavit did not add, "and not elsewhere out of the city and county of *New-York*." On this ground, without proceeding to show that the libel had been dispersed in different counties ; and agreeing that unless this was shown, the action being for a tort, the venue must be changed if the affidavit was sufficient ;

Jas. Edwards, contra, objected that it was insufficient, for want of the words, "and not elsewhere, &c."

Curia. We think so. The libel may have been, and probably was, dispersed in many counties. Such a circumstance would bring the case within *Root v. King*, (4 *Coven*, 403 ;) and put the change of venue upon the number of witnesses. The motion must be denied, for the defect in the defendant's papers.

Motion denied.

To change the venue, in an action for a tort, on the ground that the cause of action arose in a particular county ; the affidavit must state, not only that the cause of action arose there, but that it did not arise elsewhere ; and this especially of an action for a newspaper libel.

ALBANY,
Feb. 1827.

Ex parte
Benson.

Ex parte BENSON.

Where an appeal is dismissed by the C. P. on motion, upon the ground that they were never possessed of the cause; and had no jurisdiction of it, they should award no costs beyond those of the motion; not the general costs of the cause. Whether they have power to award the regular costs in the cause? *Quære.*

BENSON, executor of *Lawrence*, recovered judgment before a justice of the peace of *Chenango* county, against *John Miller*, who appealed to the C. P. The justice's return stated a judgment in the cause of *Benson v. Miller*, without the addition of executor; and after the cause was on trial before the jury, the attorney for the plaintiff objected the variance; the appeal bond reciting a judgment in favor of *Benson* as executor. The C. P. deemed the variance material, and dismissed the appeal; but refused to award any costs to the appellee, except of the application.

This court were now moved for a mandamus, commanding the C. P. to vacate their rule as to costs; and allow the whole costs of the appellee, up to the time of dismissing the appeal.

J. Foote, for the motion.

It was not opposed; but

Per Curiam. We think the C. P. were right. The parties were not before them for any purpose except the motion; and they were not bound, even if they had jurisdiction, to award the regular and ordinary costs of the cause. These follow, only where the suit comes into court. Here it never was there. There was a want of jurisdiction as to the cause itself; and when we say the C. P. has jurisdiction of the parties for the purpose of awarding costs, we mean the costs of the motion; the matter alone upon which the court can act.

Motion denied.

*Ex parte MALLARD.*ALBANY,
Feb. 1827.*Ex parte*
Mallard.

S. P.

ON appeal to the *Madison* C. P. from a justice's court, by *Mallard*, against whom the justice had rendered judgment at the suit of *Cheesebrough*, the cause had been noticed for trial three times. It was once put off at the request of the appellee; and again, on his motion, on payment of costs. On its being brought on for trial upon the third notice, and the jury being empaneled and sworn, the appellee proceeded with his testimony, and rested his cause. The appellant then proceeded with his testimony for a considerable time, when the appellee raised an objection that the appeal bond was defective in not providing for the appellant paying the costs of the appeal, if it should not be prosecuted with due diligence. The C. P. dismissed the appeal with full costs of the cause to the appellee, which were taxed at \$57.03, including the costs of the several terms at which the cause had been noticed for trial, except the term at which it was put off by the appellee, on payment of costs.

This court were now moved for a mandamus, commanding the C. P. to vacate the rule dismissing the appeal, and proceed in the cause, or, at least, to vacate the rule as to the costs, and allow the costs of the motion only. In support of the present motion, were cited 5 *Cowen*, 34; 4 *id.* 61; 5 *id.* 34; *Laws, sess. 47, page 295.*

J. Foote, for the motion.

It was not opposed.

Curia. The bond was clearly defective. But, for the reason given in the last case an alternative mandamus must go. The practice should be uniform in all these cases; and the present case is a striking illustration of the propriety of the rule just pronounced, aside from the question of jurisdiction. The appellee lay by a long time, being, for aught that appears, fully aware of the objection

Where an appeal cause was noticed for trial several times in the C. P. and was finally dismissed on the motion of the appellee, after the trial had proceeded for some time, upon the ground that the appeal bond was defective; held, that the court ought not, even if they had the power, to have awarded to the appellee any costs beyond those of the motion.

An appeal bond should be conditioned, that if the appeal be not prosecuted with due diligence, the appellant shall pay the costs of the appeal.

ALBANY,
Feb. 1827.

Jackson
v.
Stiles.

which he finally took, to oust the C. P. of jurisdiction. Great expense was incurred on both sides, in preparing the cause for trial, which he should have prevented by moving the court to dismiss the appeal the very first opportunity. Independent of the question as to the right of the C. P. to award this large sum for the ordinary expenses of the suit; we are prepared to say, that in the exercise of a sound legal discretion, they should not have done so.

Rule for an alternative mandamus.

JACKSON, *ex dem.* Brinckerhoff, against STILES, Miller,
tenant.

The affidavit on which to move that the landlord defend in ejectment, should show the relation of landlord and tenant. That the tenant claims no interest except as tenant to the landlord, is not sufficient.

EJECTMENT. Motion that *J. & T. Spafford* be received to defend as landlords, on an affidavit of the defendant's attorney, that *Miller*, the tenant, "claims no interest in the premises in question, otherwise than as tenant to the *Spaffords*."

P. Viele, for the motion.

S. Ross, contra.

Curia. The affidavit is insufficient. It should show the relation of landlord and tenant. This does not follow from the mere circumstance that the tenant claims no interest except as tenant to the *Spaffords*.

Motion denied.

WEBSTER and others, survivors of Webster, *against*
SCHUYLER.

ALBANY,
Feb. 1827.

Webster
v.
Schuyler.

THE declaration, containing general counts in assumpsit, was served on the agent of the defendant's attorney, on the 1st of *November*, 1826. The defendant's attorney wrote to the plaintiff's attorney, requesting a statement of their demand; which was furnished to the defendant's attorney, on the 15th of the same *November*. On the 12th of *December* following, the 40 days for pleading having expired, the defendant's default for not pleading was entered. The defendant's attorney served pleas on the agent of the plaintiffs' attorney on the next day, (*December 13th*.) He disregarded the pleas, and proceeded to execute a writ of inquiry. The defendant made an affidavit of merits. On these facts,

A bill of particulars voluntarily furnished, on request, without a judge's order, will not, *per se*, operate to enlarge the time for pleading.

A motion was now made to set aside the default, and all subsequent proceedings, for irregularity; on the ground that the bill of particulars demanded and furnished, though voluntary, had effect to enlarge the time for pleading, the same as if it had been obtained under a judge's order. If not, then the motion was put on the ground of merits.

W. Talmage, for the defendant.

M. H. Webster, for the plaintiffs.

Curia. A voluntary bill of particulars, will not, without a stipulation to that effect, enlarge the time to plead. The plaintiffs were, therefore, regular. But, as there is an affidavit of merits, let the default be set aside, on payment of costs.

Rule accordingly.

ALBANY,
Feb. 1827.

~~~~~  
Campbell  
v.  
Palmer.

*Ex parte* FERGUSON.

Money collected by an attorney for his client, must be demanded before the client can move for an attachment for its non-payment.

AN attorney of this court had collected money for the relators by suit, which he had not paid over. On an affidavit of these facts, a motion was now made for a rule that the attorney pay over the money; or show cause why an attachment should not issue against him. But the affidavit did not show that a demand of the money had been made of the attorney.

*L. Hoyt*, for the motion.

It was not opposed. But

*Per Curiam.* The money should first have been demanded. The motion must, for that reason, be denied.

Motion denied.

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CAMPBELL *against* PALMER.

MOTION, in behalf of *Norton*, the special bail of the defendant, *Palmer*, that an *exoneretur* be entered on the bail piece. On the 4th of *April*, 1826, *Palmer* was discharged under the insolvent act to abolish imprisonment for debt in certain cases. He omitted to plead his discharge; or avail himself of it in any way. The cause was tried on its merits in *August* last, a verdict found for the plaintiff, and judgment perfected in *October* term thereafter. No suit had been brought against the bail.

*S. A. Foot*, for the motion, cited 4 *John. Rep.* 409; 14 *East*, 599; 1 *Caines*, 9, 11; 2 *John. Cas.* 403; 1 *Burr.* 244; 2 *John. Rep.* 101; 1 *Dunl. Pr.* 209; 1 *Coven*, 165; *id.* 42; 5 *id.* 289.

Though a defendant be discharged under the insolvent act, if he have time to plead the discharge, but omit to do so, an *exoneretur* will not, after judgment, be ordered in favor of his special bail, on account of the discharge. They must surrender in the ordinary way.

*B. F. Buller*, contra, cited 18 *John. Rep.* 54; 9 *id.* 392; 1 *Cowen*, 427.

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Feb. 1827.

Jackson  
v.  
Stiles.

*Curia.* *Post v. Riley*, (18 *John.* 54,) and *Mechanic's Bank v. Hazard*, (9 *id.* 392,) are in point against the application. The discharge should have been pleaded, being long before judgment. This not being done, the defendant cannot avail himself of it, and the bail are concluded. They must discharge themselves in the ordinary way, by surrender. (*Franklin v. Thurber*, 1 *Cowen*, 427.)

Motion denied.

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JACKSON, *ex dem.* Everest and others, *against* STILES,  
Soper, tenant.

**EJECTMENT.** Motion (among other things,) to set aside the declaration, on the ground that it was entitled of *February* term, 1827, the term at which it was returnable. It was served on the tenant, with the notice from the casual ejector, on the 15th of *February*, 1827, several days before the term commenced.

The title to a declaration in ejectment is mere form, and good, tho' of a term after its service. So, though it be without any title at all.

*H. Bleeker*, for the motion.

*W. Swelland*, contra, cited 1 *Chit. Pl.* 265; *Dunl. Pr.* 998, 9; *Adams on Eject.* 185.

*Curia.* The motion must be denied. The entitling of a declaration in ejectment is a mere matter of form; and it is good without any title at all. (*Adams on Eject.* 185.)

Motion denied.

ALBANY,  
Feb. 1827.

The People  
v.

Judges of  
Delaware co.

THE PEOPLE, *ex rel.* Fry, against THE JUDGES OF THE  
COURT OF COMMON PLEAS of the county of *Delaware*.

A judgment obtained by attachment in a justice's court, without the defendant appearing there, cannot be set off, on motion, against a judgment in a court of record.

AN alternative mandamus was granted in this cause, commanding the defendants to vacate a rule, allowing the set off of a judgment obtained before a justice of the peace on an attachment, against the relator, in favor of *Mann*, to meet a judgment obtained in the C. P. of *Delaware*, in favor of the relator, against *Mann*. The judgment before the justice was obtained *June 13th*, 1825; the defendant not appearing to contest it. In the court of common pleas, affidavits were produced in behalf of the relator, to show that nothing was due to *Mann* from the relator; but that if the former had any claim, it was in favor of him and another jointly.

On a return of the affidavits showing these facts,

*S. Sherwood*, for the relator, moved for a peremptory mandamus.

*S. R. Hobbie*, contra.

*Curia.* The motion must be granted. By the statute, (*sess.* 47, *ch.* 238, *s.* 25, *p.* 291,) a judgment rendered upon attachment, without being contested, is but *prima facie* evidence of a debt. It is impeachable in an action upon it. The court may as well set off a bond or note on motion.

Peremptory mandamus granted.



THE PHENIX FIRE INSURANCE COMPANY *against*  
MOWATT.

THE defendant having put in special bail to this action, was afterwards convicted of a conspiracy, and sentenced to the *New-York* penitentiary for the term of two years.

*S. M. Hopkins*, now moved that an *exoneretur* be entered on the bail piece.

*S. A. Foot*, contra.

*Curia.* We have not relieved special bail in this way, by reason of their principal being in prison, unless for life, or for a long term of years in another state. (1 *John. Cas.* 28. 18 *John.* 35.) A temporary imprisonment for any cause, might as well be urged, as the ground now taken. Bail take the risk of such an event. Time, perhaps, may be given to surrender, where they are pressed with a suit; but to grant an *exoneretur* at once, for every imprisonment, would render the security worthless.

Motion denied.

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VAN SCHAICK *against* TROTTER and DUNN, impleaded  
with Douglass.

A CAPIAS AD RESPONDENDUM was issued and delivered to the sheriff, against the defendants, on the 28th of October, 1826, returnable the same day. The suit was to recover the amount of certain promissory notes given by the defendants jointly. The plaintiff required no bail; and the sheriff drew the endorsement of an appearance on the back of the capias; and saw Trotter and Dunn, on the

time, by the jury who try the issue.

The plaintiff cannot carry the cause down to trial, till a judgment by default is entered against the one who omits to plead.

Where a plaintiff inadvertently takes a judgment by default, without filing common bail, or causing the defendant's appearance to be entered, the court will allow either to be done on payment of costs; and if the omission be occasioned by the defendant's fault, then without costs.

ALBANY,  
Feb. 1827.

Van Schaick  
v.  
Trotter.

Special bail will not be discharged, because their principal is imprisoned on conviction for a crime, unless it be for life; or for a long term in another state.

In an action against several, if one pleads to issue, and another suffers judgment by default, damages must be assessed against both at the same

ALBANY,  
Feb. 1827.

Van Schaick  
v.  
Trotter.

return day, who promised to endorse their appearance; but this was not done. The sheriff returned the *capias, ce-pi corpora*, as to Trotter and Dunn, the two defendants taken, and *non est inventus* as to the other; and on the Monday following, informed the plaintiff's attorneys, that he had served the process on two of the defendants; but the other was not found.

Trotter and Douglass retained an attorney, who gave notice of retainer. The plaintiff declared; and on the 8th of January last, the defendant, Trotter, pleaded the general issue to two counts; and demurred generally to two others; the declaration containing four counts. Dunn did not plead; and his default, for want of a plea, was entered on the 22d of January last. The plaintiff took an inquest upon the issue, and assessed contingent damages on the demurrer at the Albany circuit, February 6th, 1827, on a venire *tam quam*; and the damages were found and assessed by the jury against Trotter only. The plaintiff then, at this term, entered the judgment by default, and noticed the assessment of damages against Dunn, before the clerk. No appearance was yet entered, or common bail filed for Dunn.

*L. Gardenier*, moved to set aside the default against Dunn, and the inquest against Trotter, for irregularity. He cited 7 John. 270; 1 Dunl. Pr. 569, 70; 3 Saund. 300 a.; Tidd's Pr. 671; Tidd's App. 164; 6 John. Rep. 325; 11 Co. Rep. 5; 1 Lil. Ent. 137; 2 B. & P. 163; 1 Archb. Pr. 9; 1 Sell. Pr. 11; Rich. Pr. C. P. 11; Rich. Pr. K. B. 225.

*J. King*, contra, cited 1 Dunl. Pr. 569, 570; 3 Saund. 300, a.; Tidd's Pr. 671; 3 John. 153; 2 Coven, 43.

*Curia*. The inquest was irregular; and must be set aside with costs. Where there is an issue as to one defendant, and a default as to another, the damages should be assessed against both defendants by a jury at the circuit, on a venire *tam quam*. The note was against all the defendants; they were all sued; and the plaintiff could not

carry down the issue for trial as to both, till he had obtained judgment by default against *Dunn*. (17 *John*. 270.) The cause would then have been in a state for trying the issue as to one, and assessing the damages against both. The course taken here might, and probably would, result in a different amount of damages against different defendants, on the same joint contract.

We deny the motion to set aside the default, and any of the subsequent proceedings, except the inquest. The plaintiff proceeded in good faith; having every reason to suppose that an appearance was endorsed upon the process. If this had been done, and the clerk had inadvertently omitted to enter it, we, of course, should have allowed it to be done *nunc pro tunc*. (1 *Caines*, 512.) It is also much a matter of course to allow common bail to be filed, where it is omitted by the plaintiff through mistake or inadvertence. (2 *Cowen*, 43.) Here the plaintiff was misled; and that too, in some degree, by the act of the defendants themselves. They promised the sheriff to endorse their appearance; but omitted to do so. The plaintiff may now enter their appearance, or file common bail *nunc pro tunc*, without costs.

This saves the proceedings in their present situation, except as to the inquest. The issue and default both stand, upon which the plaintiff can go regularly down to the next circuit, and try his issue, joined with *Trotter*, and assess damages against *Dunn* simultaneously.

Rule accordingly.



GOULD and BANKS against BRUCE, sheriff, &c.

Cross motions. The defendant moved for judgment as in case of nonsuit; and the plaintiffs, to strike out the notice given by the defendant with his plea. The cause be-

a sheriff, is within the statute, (1 *R. L.* 426, s. 23,) and must be supported by the defendant's affidavit that the escape was without his consent, privity, &c.

ALBANY,  
Feb. 1827.

Gould  
v.  
Bruce.

A plea or notice of voluntary return before suit, in an action of escape against the defendant,

ALBANY,  
Feb. 1837.

Cayward  
v.  
Doolittle.

ing at issue, was noticed, but not tried, at the last *Niagara* circuit. It was an action of debt for the escape of one *Chapin* from the custody of the defendant, as sheriff, on a *ca. sa.* Plea, the general issue, and notice of voluntary return before suit. This notice was not accompanied with an affidavit. The plaintiffs noticed the cause for trial without discovering that the omission was material; and offered that as the excuse for not trying; deeming it necessary to move to strike out the notice.

*A. Samson*, for the plaintiffs, cited 1 *R. L.* 426; 16 *John.* 312.

*T. H. Chapin*, contra.

*Curia.* The statute (1 *R. L.* 426, *sec.* 23,) is, that a plea or notice of *retaking on fresh suit*, shall not be received, unless the defendant make and file an affidavit that the escape was without his knowledge, privity, &c. It is denied that these words extend to the plea or notice of a *voluntary return*.

We think the latter is within the equity of the statute, which is remedial; and intended to prevent the officer's connivance at escapes.

We therefore deny the motion, for judgment as in case of nonsuit, on payment of costs. We grant the motion to strike out the notice; the defendant to be at liberty to retain it, however, on filing the proper affidavit, and paying costs.

Rule accordingly.

CAYWARD *against* DOOLITTLE and others.

A writ of replevin, tested at one term, and returnable at the next term but one, (an entire term intervening,) is voidable.

MOTION, in behalf of the defendant, to set aside the writ of replevin issued in this cause, on the ground that it was

*Semb.* it may be amended; but not unless the defect appear to have arisen from mistake; and all suspicion be removed that the long return day was a trick to postpone the trial.

tested *August 19th*, 1826, and returnable on the 1st day of the present term, (*one entire term intervening.*)

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*D. O. Bell*, for the motion.

*Whiting and Butler*, contra.

*Curia.* The writ is clearly voidable at least. Goods cannot be arrested in this way, and the trial of the right postponed to any future time the party pleases. The writ might, perhaps, be amended, if we were satisfied that it was a mistake. (1 *Cowen*, 38.) But how it happened is not shown. It might have been a trick to get possession of the goods; and postpone the trial by a long return day. The affidavits do not entirely remove the suspicion, that this proceeding was rather for the purpose of obtaining the vantage ground, in a negotiation about the property, which had been taken on attachment, than with the *bona fide* intention to try any question of right. The defendants show that the property was taken in *September* last; and one of the defendants was not summoned till on the eve of this term. There should be a strong excuse, to warrant an amendment under these circumstances.

Motion granted with costs.

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*Ex parte* SCHROEDER.

J. T. IRVING, first judge of the C. P. in the city and county of *New-York*, on the application of *Hans Harms*, granted an attachment against *Schroeder*, as an absent debtor, within the statute, (1 *R. L.* 157.) *Harms*, the creditor, at the time of suing out the attachment, was a citizen of *Hamburg*; not a resident of the state of *New-York*, nor domiciled here, nor in the *United States*; but was transiently in *New-York*. *Schroeder*, the debtor, was then, and continues to be, a permanent resident of

A foreign creditor cannot proceed here under the absent and absconding debtor act, (1 *R. L.* 157,) against a debtor residing abroad; the debt not being contracted within this state.

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*Charleston, South Carolina*; never resided in the state of *New-York*; and was esteemed solvent, and in good credit as a merchant. The property attached was merchandize, which arrived at the city of *New-York* in a vessel bound for *Charleston*, which put into *New-York* by reason of stress of weather.

The attachment was granted early in *February*, 1827. But on the above facts being shown by affidavit, judge *IRVING* ordered cause to be shown before him on the 19th, why the attachment should not be superseded. Cause being shown accordingly, he, on the next day, delivered his opinion as follows:

*IRVING*, Judge. The 1st section of the statute for relief against absconding and absent debtors, (1 R. L. 157,) declares that any person, being *indebted within this state*, who shall secretly depart, or be concealed, &c. may be proceeded against under the act. The 8th section provides for the appointment of trustees; and the sections which follow to the 17th, prescribe their conduct and duties. The 17th section states how they shall make distribution; and the 18th, who shall be considered creditors, and entitled to share in the debtor's property. The 19th also relates to the creditors; the necessity of their notifying the trustees of their demands, and the consequences of their neglect.

Then comes the 20th section, which appears to be in continuation of the 18th and 19th. It is, "that any creditor out of this state, shall be deemed a creditor within this act; and his attorney, on producing a letter of attorney duly authenticated, &c. may proceed, and act in the same manner under this act, as if the creditor himself was present."

Does this relate to his being entitled to claim a share in the distribution, after trustees are appointed? And is it restricted to this? or is a foreign creditor authorized to proceed against the property of a foreign debtor? If so, will not the provision conflict with the 1st section of the act, which states that the debtor shall be *indebted within*

*this state?* And with the 23d, which provides that the property of every foreign debtor who resides out of this state, and *is indebted within it*, shall be liable to be attached, sold, &c. in like manner as the estates of debtors within this state?

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The 1st section provides for the attaching of the property of a debtor who resides in this state; *is indebted within it*, and absconds. The 23d section provides for the attaching of the property of a debtor who resides without this state; but *is indebted within it*. Both would appear to contemplate that debts only of this description could be the foundation of an attachment under this act.

The decision in 6 *John. Ch. Rep.* 185, was in the case of a debtor who resided in this state, and absconding from it; his creditor residing abroad. The case in 5 *Cowen*, 293, was that of a debtor who fled from *England*, concealed himself here to avoid arrest, and was pursued by his creditor.

The reasons given by the supreme court in the case of *Fitzgerald*, for not allowing a foreign creditor to attach here the property of his foreign debtor, is very strong; and I do not think I would be justified in going farther than the supreme court has authorized in 5 *Cowen*, which is the case of a foreign debtor, who fled from his creditor, came within our jurisdiction, and concealed himself here, to avoid being made to account.

Under such circumstances, as the supreme court is in session, I shall leave the parties to make application for a supersedeas or relief to them; and, in the mean time, order all proceedings to be stayed.

A motion for a supersedeas was accordingly made to this court.

*S. Stevens*, for the motion.

*J. Anthon*, contra.

*Curia.* We think judge *Irving* was right in holding that *Schroeder* was not indebted *within this state*. Unless this be so, the case is not embraced by the provisions

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of the statute in question. We cannot presume that the debt upon which *Harms* proceeded, was contracted in this state. For aught that appears, the debtor was never within our jurisdiction. Could even a resident creditor proceed by attachment here upon a contract made abroad?

*Fitzgerald's* case, (2 *Caines*, 318,) is exactly in point; and has not been overruled or questioned, except so far as it denies the right of a foreign creditor to proceed under the act in any case. *Robinson v. Cooper*, (6 *John. Ch. Rep.* 186,) was the case of a foreign creditor proceeding against a debtor resident in this state; and in *Caldwell's* case, (5 *Cowen*, 293,) the foreign debtor had fled to this state, and was concealed here; and, according to our recollection, there was satisfactory evidence of his being domiciled here. (a)

Supersedeas granted.

(a) The court, I am sure, considered the debtor domiciled in this state, under the circumstances of that case. I reported the case, merely in reference to the right of a foreign creditor, independent of the question where his debtor is domiciled.

#### THE UTICA INSURANCE COMPANY against SCOTT.

Assumpsit against the defendant, as endorser of a promissory note to the plaintiffs. The defendant pleaded a special plea, to which the plaintiffs replied; and the defendant demurred to the replication, and the plaintiffs joined in demurrer. The supreme court gave judgment for the defendant, on the ground that the replication was defective, and held the plea good. This was in *May* term, 1821. (See 19 *John. Rep.* 1, S. C.) On error to the court for the correction of errors, (December session, 1826,) the judgment of the supreme court was reversed, on the ground that the plea was defective for want of precision or other plea was bad.

But this was on paying the costs of both courts.

The supreme court considered the case the same as if the plea had been overruled in that court on the demurrer.

That court will allow a plea, holden bad on the demurrer to the replication, to be amended; though the plea set up an unconscionable defence.

But they will not allow a new plea to be added, setting up a new defence which is unconscionable.



imperfection (as the defendant stated in his affidavit.) The record being remitted to this court, a motion was now made by the defendant to amend his plea. The affidavit of the counsel for the plaintiff stated that he heard the opinions delivered in the court of errors ; and understood the reversal to be on the ground that the replication was good ; not on the ground that the plea was bad.

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*A. Van Vechten*, for the motion, cited 2 *John*. 233 ; 3 *id.* 257 ; 10 *id.* 26 ; 2 *Dunl. Pr.* 1139 ; 5 *Taunt.* 264.

*Talcott*, (attorney general,) contra, cited 1 *John. Cas.* 246 ; 1 *Coven*, 37 ; 18 *John.* 310 ; 1 *Burr.* 322 ; 18 *John.* 30 ; *Tidd's Pr.* 657, 660 ; 9 *John.* 78 ; 3 *id.* 148 ; 2 *John. Cas.* 284 ; 3 *id.* 140, 141, 300, 301 ; 1 *East*, 135, 391 ; 2 *B. & P.* 482 ; 3 *B. & P.* 11, 12 ; 19 *John.* 1 ; 2 *Bl. Rep.* 1073 ; 4 *John. Ch. Rep.* 332 ; 4 *T. R.* 228 ; 1 *Burr.* 402 ; 2 *Str.* 1002 ; *Tidd's Pr.* 818 ; 3 *John.* 181 ; 1 *B. & P.* 339 ; 4 *T. R.* 468 ; 1 *Burr.* 54 ; 2 *Burr.* 936.

*Curia.* Allowing this amendment is a matter of discretion. It is objected that the application comes too late : the proceedings being no longer in paper, as it is expressed in *England*. This might formerly have been an objection ; but it is not so at this day, when a much greater latitude than formerly prevails in favor of amendments. It will be seen by consulting the authorities, that courts have, of late, not confined themselves strictly to cases where proceedings may be said to be in paper ; but they have been guided by the question whether substantial justice requires the amendment, at whatever stage of the proceedings it may be moved.

The motion is to amend generally. This is objected to ; because the defendant may add a new plea, and set up a technical usury in discounting the note ; an unconscionable defence undoubtedly ; and what we shall not allow. Again ; it is said the original defence is unconscionable ; which was a plea that the note in question was discounted contrary to the restraining act ; and the case is likened to the principle which denies a new trial in a hard action ;

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where the the court, in the exercise of their discretion, will sometimes refuse a party the second chance of success, who has failed to recover on the first trial. We agree that we will not allow a new defence which is unconscionable; but we are not aware that the principle can be extended to this case. The plea is to be regarded now as if it had been overruled in this court upon the demurrer; and on the ground that it was so defectively drawn, as not to present the defence which it aimed at. This is much a matter of course; nor has it been denied merely because the particular plea sought to set up an unconscionable defence, provided it was a valid one. The defendant ought not to suffer from the delay, under the circumstances of this case. The plea was holden good in this court, but overruled on error against him. There is, to be sure, some dispute of this; but the defendant so understands it. The dispute probably arises from the manner in which the opinions of the court for the correction of errors are delivered. From the great number of that body, and the different grounds often taken by members in deciding a cause, such difficulties are not unusual. Nor is it very material, as we allow only an amendment of the particular plea, to which we think the party has a right; and which must be done on payment of all costs of the demurrer, of this motion, and of the cause in the court for the correction of errors.

Rule accordingly.

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BUTTERFIELD *against* COOPER.

MOTION to set aside a *ca. sa.* against the defendant, on the ground that no *fi. fa.* had first been issued; the defendant having put in special bail. But the balance of proof upon the affidavits, was, that no regular notice of special bail had been given to the plaintiff's attorney.

*E. Fowler & J. H. Bronson*, for the motion.

The plaintiff is not bound to know that special bail is in, unless the defendant give regular notice thereof; and may, therefore, tho' special bail be in, issue a *ca. sa.* without first having issued a *fi. fa.* if there be no notice of bail given.

*G. C. Sherman, contra.*

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*Curia.* The plaintiff was not bound to know that special bail was in, without regular notice of bail. The motion must be denied.

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v.  
Hatch.

Motion denied.

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WELLS against HATCH.

THE plaintiff having made a case in this cause, upon which to move for a new trial, a motion was made in his behalf, to bring on the argument upon its order on the calendar: But

An affidavit of the defendant's attorney was read on the other side, stating that on the 28th day of February, when it was too late to notice the cause for argument, no copy of the case settled by the circuit judge had been served on him. And a motion was made in his behalf, grounded on this affidavit, (he having also served notice of argument,) that a new trial be denied. And for him was cited *Honay v. Chesterman*, (5 Cowen, 22.) Contra, was cited *Delamater v. Smith*, (16 John. 2.)

A motion for such rule as a party is entitled to, upon the ground that a copy of the case is not served upon him, according to the practice of the supreme court, must be noticed and brought on as a non-enumerated motion.

*W. Hay*, for the defendant.

*I. W. Paddock*, for the plaintiff.

*Curia.* *Delamater v. Smith*, (16 John. 2.) lays down the rule of practice, when it is intended to move to strike the case from the calendar, so as to prevent its being argued. Notice must, in such case, be given as for a non-enumerated motion. In *Honay v. Chesterman* (5 Cowen, 22,) the motion was, that a new trial be denied, on the ground that the party making the case had not served a copy in due season, and the opposite party had noticed it for argument. We granted the motion, on the cause being moved upon the calendar, without our attention being called to the inconvenience of thus mingling motions of an

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enumerated and non-enumerated character together ; and the surprise which such a practice may many times produce to the party making the case. We think the practice should be uniform in these motions which relate to the calendar ; and that where a copy of the case is not served according to the practice of this court, the application to deny the motion sought by the case, or for such rule as the party is entitled to by the neglect, shall come on upon a regular notice, as for a non-enumerated motion.

Rule accordingly.

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*Ex parte DREW.*

Where the defendant in a justice's court, pleads title to an action of trespass *quare clausum fregit*, he is bound to abide by his plea, on the same action being brought in the C. P. tho' the action in the C. P. be not commenced at or before the term of the C. P. next after the plea is interposed in the justice's court.

MYERS sued *Drew* in a justice's court, for trespass *quare clausum fregit*, alleged to have been committed in *Rensselaer county*. *Drew* justified by a plea of title, on the 4th of June, 1825, and entered into a recognizance, such as is required by the 9th section of the 50 dollar act, (*sess.* 47, p. 283.) In May, 1826, a *capias ad respondendum* was served on *Drew*, at the suit of *Myers*, issued out of the *Rensselaer* C. P. two terms of that court having intervened between the time of pleading, &c. before the justice, and the issuing of the *capias*. *Myers* declared for the same trespass as the one in question before the justice ; *Drew* put in special bail, and pleaded the general issue, which the C. P. on motion, ordered to be stricken out, with costs.

*J. Van Vleck*, for *Drew*, now moved for a mandamus, commanding the C. P. to vacate the rule to strike out, &c. and receive the plea. He said the only question was, whether the plaintiff could hold the defendant to his plea of title, in an action not brought till after the term next following the interposition of the plea in the justice's court : and contended that he could not. He said the C. P. held, that by not commencing his action by the next term of the C. P. the plaintiff merely lost his right to compel the de-

fendant to put in special bail, or forfeit his recognizance ; but that he was, notwithstanding, compelled to put in his plea of title.

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v.
Clapp &
others.

The Court held that the C. P. had decided correctly ; and denied the motion.

Motion denied.

BROMAGHAM *against* CLAPP and OTHERS.

IN PARTITION. The defendants brought a writ of error from this court, but did not put in bail. There was also a defect in the writ of error ; but the court for the correction of errors allowed it to be amended, and retained the cause. Before the amendment was allowed, the plaintiff issued two writs of *fi. fa.*, one against *Clapp*, and one against *owners unknown*, for different portions of the costs in partition.

A writ of error from a judgment in partition, does not stay execution, *per se* ; but bail in error is necessary.

Jas. Edwards, (*S. A. Foot*, same side,) now moved to set aside the executions as irregular.

J. V. N. Yates, contra.

Curia. By the statute, (1 R. L. 512, s. 12,) "error may be brought within the same time, and under the like restrictions and regulations, as in other cases." This undoubtedly refers to the *restrictions* and *regulations* in the previous act "concerning writs of error," &c. (1 R. L. 143.) Independent of that act, there is no restriction on the subject. The writ is one of right, and issues of course, in all actions, real, personal and mixed. That act requires two things on bringing error from this court ; the certificate of counsel, and bail. The former is not necessary on error from the common pleas to this court : and had this writ been from a judgment in partition, rendered in the common pleas, there would be nothing, (not even the certificate,) to satisfy the words quoted from the stat-

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ute of partition, except bail. Bail is given in ejectment and dower. Doubtless, one reason is, because costs follow, always in the former, and often in the latter. The same principle exists in partition. The reason why bail is not generally required on error from judgments in real actions, is, that the demandant does not recover costs. The principle of requiring bail, therefore, concurs with the words of the statute.

But the point is new in practice, and the party proceeded in good faith. Let the executions, therefore be set aside, on payment of costs, and putting in and perfecting bail in error.

Rule accordingly.

EXECUTORS OF PROUTY *against* M'DOUGALL.

In assumpsit by executors, brought in the supreme court, and referred, they recovered less than \$50. *Held*, that they should not recover costs.

Held, also, that being executors, they were not liable to pay costs.

Held, also, that they were bound to pay the referees' fees within the statute, (1 R. L. 517,) which imposes this upon the prevailing party.

IN assumpsit on promises made to the testator, the plaintiffs recovered before statute referees, \$28,70. The suit was commenced in 1820. The accounts of both parties exceeded \$400.

The questions were submitted by consent, 1. Whether the plaintiffs were entitled to costs; 2. If not, whether they should pay costs to the defendant; 3. Whether the plaintiffs or defendant were bound to pay the referees' fees.

S. W. Jones, for the plaintiffs.

N. F. Beck, for the defendant.

Curia. The suit being in this court, the plaintiffs are not entitled to costs. Had it been in the common pleas, the rule would have been otherwise, because the accounts of both parties exceeded \$400. (4 Cowen, 396.)

Nor is the question affected by the 5th section of the statute of 1818, (*sess.* 41, *ch.* 94, *p.* 80.) This provides, that in any action which may be brought in a justice's court, the plaintiff, suing in a court of record, shall not re-

cover costs, unless he recovers damages to more than \$50. That section says nothing of the defendant's costs.

The next question is, whether the defendant shall have costs. This depends on the 2d and 4th sections of the statute concerning costs. (1 R. L. 343.) The 2d section denies costs to the defendant, where the plaintiff sues as executor or administrator in right of the testator or intestate, though he fail to recover any thing. The 4th section declares that the plaintiff not recovering in the supreme court more than \$50, shall pay costs. But the latter section has never been construed to apply to executors or administrators. The same provisions run through various revisals of our laws; but the cases have been uniform in protecting personal representatives against costs; and that too, even since they might sue before justices. (2 John. Cas. 209. 6 John. Rep. 379.) The rule laid down in *Hamlin v. Hart*, (4 Cowen, 396,) applies only to parties suing in their own right.

Another question is, who shall pay the referees' fees? By the statute, (1 R. L. 517,) they are to be paid *by the prevailing party*; that is to say, the one in whose favor the report is made. The plaintiffs are here the prevailing party. They are to pay the referees, though the fees cannot, as in ordinary cases, be allowed to them in taxation against the defendant.

Rule accordingly.

HEPBURN *against* HOAG and HEPBURN. (a)

DEBT on the penalty of articles of agreement, tried at the Columbia circuit, in September, 1824, before BETTS, (late) C. Judge.

the penalty in articles of agreement, by which the defendants covenanted to maintain the plaintiff, &c. and provide him with proper medicine and attendance.

Damages due upon such an agreement cannot be set off; and where damages are not, in their nature, capable of set-off, they cannot be met by a set-off, in an action for them.

The difference in the phraseology of the act of 1813, (1 R. L. 515, sect. 1,) in the last revision of the laws, from former acts, has not extended the right of set-off; but the present statute should be construed as were the former statutes on that subject.

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A set off is
not allowable
against uncer-
tain damages;
e. g. in debt for

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By the articles, the defendants agreed, (*inter alia*,) to pay \$500, and maintain and support the plaintiff, his mother and sister, in sickness and health, in all necessary and comfortable meat, drink, washing, lodging, wearing apparel, medicine and medical attendance; and in all other convenient and comfortable respects, which their circumstances and situations might require. To these things they bound themselves in the penalty of \$2000. One of the breaches assigned was, that the defendants had not maintained and supported the plaintiff; and on this breach alone was evidence offered at the trial.

The defendants offered in evidence a set-off, under a notice, for that purpose, of money paid for the plaintiff, amounting to \$1172,89, before the commencement of the suit. This was objected to; and overruled as inadmissible, by the judge: but he received the evidence of the amount paid; and allowed the jury to certify the balance due to the defendants, over and above the \$500 mentioned in the articles, with a view to have the question settled by this court. They assessed the plaintiff's damages at a specific sum; and certified the balance due to the defendants accordingly.

E. Williams, for the defendants, moved for a new trial. He cited 1 *R. L.* 515; 3 *John. Ch. Rep.* 360, note (a); *id.* 573; *Willes*, 261; 2 *Burr.* 820.

C. Bushnell, contra, cited 4 *Cowen*, 57; 2 *John.* 155; 5 *id.* 105; *Mont. on Set-Off*, 18, 19; *Dunl. Pr.* 476, 8, 9, 500; 3 *John. Ch. Rep.* 351, 4, 7, 8; *id.* 473, 5; 4 *id.* 292, and cases there cited; 1 *R. L.* 515; 1 *K. & R.* 347, sect. 1; 2 *Cowen*, 173, per *Woodworth, J.*; 4 *Cowen*, 498, 9.

Curia, per *WOODWORTH, J.* It seems to me this is clearly a case of unliquidated damages. The question is, not simply, what is the value of boarding and lodging by the week or otherwise? or how much should be charged by a physician for defined and specific services? or what is a reasonable sum for a certain quantity of medicine? but it involves this inquiry: what shall be considered as

necessary and comfortable support and apparel? It must be suited to the circumstances of the plaintiff; and depends on a fair and reasonable construction of the covenant. On this point, a jury would be obliged to exercise a sound discretion; and perhaps different jurors would form different opinions. How then can it be said the damages are certain? Again; medicine and medical attendance are to be provided in sickness. Suppose the parties disagree as to the medicine and medical attendance required; and the plaintiff considers himself warranted, under the covenant, to procure other and more frequent medical attendance than the defendants are willing to afford; would not the jury be called on, in assessing the damages, to pass on this question? and if it appeared that reasonable attendance and medicine, according to the degree or severity of the sickness, had not been furnished, to allow the plaintiff damages for whatever additional expense he had necessarily incurred in this respect? This view of the subject does, in my opinion, place the plaintiff's claim among the cases where uncertain damages are sought to be recovered; and consequently it could not be set off. If it could not be set off by the plaintiff in an action against him by the defendants, it is well settled that the defendants are not entitled to the benefit of it as a set-off. The law on this point is laid down in several cases. (2 *John*. 155. 5 *id.* 105. *Mont. on Set-Off*, 18, 19. 3 *John. Rep.* 351. 4 *id.* 292.)

But it is contended that the statute, (1 *R. L.* 515, s. 1,) has extended the doctrine of set-off, by the insertion of the words, "or have demands arising on contract or credits against each other." I think it is evident the legislature did not intend to change the law; so as to give a party the benefit of uncertain damages by way of set-off. If they did, why does the same section provide, that if the suit be brought on a bond or other contract, for the recovery of a penalty for the non-payment of money only, and such bond be given in evidence by the plaintiff or defendant, the sum *bona fide* due, and not the penalty, shall be deemed to be the debt? Such a bond or contract, unless for the payment

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of money only, cannot be given in evidence. If the former part of the section was intended to extend the doctrine of set-off, it may be presumed the legislature would have allowed a bond conditioned for the performance of covenants, to be given in evidence, equally as if for the payment of money.

The question of set-off has frequently arisen since the passing of the statute of 1813; and I apprehend that, in no case, have the courts of law or equity given that statute a construction variant from what obtained previous to the last revision of the laws. In the case of *Duncan v. Lyon*, (3 *John. Ch. Rep.* 351,) chancellor *Kent* examined the question elaborately; and decided that a breach assigning the non-performance of a covenant, in not furnishing timber and provisions, was a demand at law in the nature of redress for a wrong or injury committed, and not for a debt due; that it rested entirely in uncertain and unliquidated damages. This case was several years after the act of 1813; and is an authority to show that no alteration had been made in the doctrine of set-off by that act. The decision of the judge at the circuit on this point was correct; but he erred in allowing the balance claimed by the defendants, to be certified in their favor. In this very case, (4 *Coven*, 57,) we decided that the certificate was a nullity.

As to the hardship of this particular case, the answer is, we do not possess the power of applying the remedy. The statute is remedial; and embraces certain cases only. Until the legislature interfere, and alter the law, a defence like that relied on by the defendants, cannot be available by way of set-off. The motion for a new trial must be denied.

New trial denied.

JACKSON, *ex dem.* Ten Eyck and wife, *against* RICHARDS.

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Jackson

v.
Richards.

EJECTMENT for a part of land called tract H., *Massena*, *St. Lawrence* county; tried at the circuit in that county, *February 9th*, 1826, before WALWORTH, C. Judge.

At the trial, the plaintiffs having deduced a regular title to one undivided half of the premises in question, to *Ann*, wife of *Ten Eyck*, who are the lessors of the plaintiff, by descent from *Ann's*, the wife's father, *M. Vischer*, who died in 1793, rested.

The defendant, to show title out of the plaintiff, gave in evidence a conveyance of the premises in question, (among other land,) from *Ann*, while sole, and her co-heir, *Sebastian Vischer*, to their mother, *Lydia Vischer*, in fee, dated *March 13th*, 1800. This proof was by an exemplified copy of the conveyance from the secretary's office.

In answer to this, the plaintiff's counsel read in evidence an instrument dated *October 12th*, 1824, which was attached to the conveyance from *Ann* and *Sebastian Vischer*, and executed by their mother; by which she certified, that the conveyance from *Ann* and *Sebastian Vischer*, was never executed and delivered to her, or agreed to be executed and delivered to her, by the grantors, or either of them; and that she never had seen, or had the possession of it, or done any act signifying her assent to take the estate conveyed by it. And she thereby declared her dissent; and that the conveyance was, as to her, her heirs, &c. inoperative and void; and that the land conveyed by it was vested in *Ann* and *Sebastian Vischer*. This instrument was acknowledged the *12th*, and recorded in the secretary's office the *14th* of *October*, 1824, in the usual form of acknowledging and recording deeds of land. It was read

It is essential to the validity of a deed, that it should be delivered and accepted.

But the fact of non-acceptance cannot be shown by the written declaration of the grantee; especially where third persons are interested in maintaining or defeating the deed. It must be proved, like any other fact, by disinterested witnesses under oath.

It is essential to a valid disclaimer, that the case be such that the estate or thing disclaimed would pass or vest, but for the disclaimer; unless it be made an express condition of the grant, that the grantee shall elect.

This proposition illustrated by the cases.

A disclaimer

may be by record; and sometimes by deed or *in pais*.

Where a conveyance of land is drawn and sealed, but not delivered, it is void; and not a case for disclaimer on the part of the grantee.

A written disclaimer, therefore, in such case, being put on that ground, not affecting the title to lands in any way, is not an instrument which can be acknowledged, or proved, and recorded, within the registry act, (1 R. L. 369.)

Where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of other parts of the tract.

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without proof of its execution, otherwise than by the acknowledgment and recording.

The admission of this deed was objected to by the defendant's counsel, on the ground that it was not an instrument proper to be acknowledged and recorded; and was inoperative as a deed; but it was received by the judge, by consent, subject to the opinion of this court.

Verdict for the plaintiff, subject to the opinion of this court.

The judge also decided a point of adverse possession, which was not discussed on the argument; but which will be found mentioned at the close of the opinion of the court.

J. V. Henry, for the plaintiff. The exemplification of the conveyance from the secretary's office was mere *prima facie* evidence, liable to be opposed by the disclaimer, or dissent of the grantee. An exemplification of the disclaimer was admissible. Every deed, conveyance, or writing concerning real estate, may be proved and recorded; and then becomes evidence of itself. The grantee had a right to dissent; and the writing is evidence of the fact that she did dissent. He cited 4 *John. Rep.* 161; 1 *John. Cas.* 114, 116; *Shep. Touch.* 58, 68; 8 *Vin.* 487, 488, *Disagreement, (A.) pl.* 2, 10; *id.* 489, *pl.* 18; *id.* 490, *pl.* 23; *Moore*, 300; 4 *Cruis.* 529, *Tit.* 32, *Deed, ch.* 22, *s.* 1; 22 *Vin.* 529, *Waiver, (A.) pl.* 4.

P. S. Parker, contra, cited 10 *John.* 456; 6 *id.* 149; 20 *John.* 187; 3 *Rep.* 26; 4 *Cruis.* 367, *Tit. Deed*; 2 *Rep.* 60, 61.

He strenuously contended, that the paper set up as a disclaimer, was a mere memorandum; and could not be received as testimony, any more than a written statement from a stranger; that *Lydia Vischer* was a competent witness, and should have been sworn.

Curia, per SUTHERLAND, J. The material question in this case is, as to the admissibility and effect of what is called the disclaimer of *Lydia Vischer, of the 12th of*

October, 1824. This instrument was duly acknowledged before a competent officer, and recorded in the office of the secretary of state, on the 14th of October, 1824. It was produced and read upon the trial, without further proof, as an instrument entitled to be recorded under the act of April 12th, 1813, entitled "an act concerning deeds," (1 R. L. 369, s. 5.) It was objected to on the part of the defendant, 1. As not coming within that act, and therefore not duly proved; and 2d. That admitting it to be technically within this act, it was nothing more than a statement under the hand and seal of Mrs. Vischer, of facts which she was a competent witness to prove, and which, if true, should have been established upon the trial by her oath, and not by her declaration in writing.

The defendant, previously to the introduction of this instrument, had proved and given in evidence, a deed from Sebastian Vischer, and Ann Vischer, one of the lessors, to Lydia Vischer, bearing date the 13th of March, 1800, of all their right, title and interest in, or to the real or personal estate of their father Matthew Vischer, of which the premises in question were a part. The title of the lessor, Ann Vischer, to an undivided half of the premises, as one of the two heirs at law of her father, was therefore, shown to have been alienated, and her right to recover defeated. The object of introducing the disclaimer of Mrs. Vischer, was to show that the deed from Sebastian and Ann Vischer, to her, of the 13th of March, 1800, had never been delivered to, or received by her; that it was executed and recorded without her knowledge, privity, or consent; and that she never did, and does not now claim to hold any thing under, or by virtue of it. If these facts are true, the deed was unquestionably void; and nothing passed by it to Mrs. Vischer. It is essential to the validity of a deed, that it should be delivered by the grantor and accepted by the grantee. A deed takes effect only from its delivery; and there can be no delivery without an acceptance, either expressed or implied. The deed acquired no efficacy from the circumstance of its being recorded. There was nothing in that act equivalent to a

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without proof of its execution. Upon the face of it, is knowledge and recording of a deed, or conveyance, may

The admission of this is a truth what it purports to defendant's counsel, on it being engrossed by a recording ment proper to be in the files of a public office. (*Jackson* inoperative as *John. Cas.* 114. 12 *John.* 422. 20 *John.* by consent.

Verdict that was necessary, therefore, to defeat this court was, to show that it had never been delivered by the grantor, and accepted by the grantee. Can that be shown by the written declaration of the grantee? or must it be proved, like any other fact, by the testimony of competent witnesses, under oath?

The doctrine of *disclaimer*, or *disagreement*, or *waiver*, appears to me, not to be applicable to a case like this. It would seem only to apply to cases where the party who disclaims, or disagrees, has an *election* at the time of his disclaimer, either to affirm and receive, or to repudiate and reject, the estate or thing intended to be conveyed or given. It is an abuse of language, to say that *A.* disclaims or waives that which he has not the power to take.

It is also essential, I should apprehend, to a valid disclaimer, that the case be such that the estate or thing disclaimed, would pass or vest, but for the disclaimer, unless it be made an express condition of the grant that the grantee shall elect.

Most of the cases of disclaimer in the books, are disclaimers in pleadings, though a disclaimer may be, and frequently is, by deed, or *in pais*.

A few of the cases to be found in the books, will illustrate these principles.

"If a lease is made to *A.* for life, remainder to *B.* and *A.* dies, the law adjudges the frank tenement in *B.* till he disagrees or disclaims; and by the waiving thereof, it vests in the donee or his heirs." (*Fin. Abr. Disagreement*, (*A.*) pl. 2.) There the estate passed from the grantor to the tenant for life, and *B.* had an election whether to take the remainder or not; and but for his disclaimer, it would have vested in him.

a fine is levied to two; and *one does not enter*, nor thing; and the other enters, and is impleaded, may plead joint tenancy with the other; for the fine and the entry of the one, shall be ad-
 v. to be in both, *till the other disagrees by matter*
ord." (*id. pl. 4.*)

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"If a man makes a gift of his goods to me by deed in my absence, this is good without livery made to me of the deed, *till I disagree to the gift,*" &c. (*id. pl. 5.*)

"When one has election to have a thing or refuse it, if he refuses it, then it was never in him. But if he agrees, then it has a relation to the first act done." (*id. pl. 10.*)

"So where four were enfeoffed, and seisin delivered to three only, in the name of all, the fourth comes and views the deed, and by parol disagrees to the deed. Yet this doth not divest the freehold out of him; but the tenancy remains in all, until disagreement in a court of record." (*id. pl. 14.*)

"Disagreement by covenant to an indenture of covenant, to stand seised to uses, which was delivered to a stranger to the use of covenant, defeats all the uses and estates; for there can be no covenant for want of a covenant." (*id. pl. 18.*)

Such person as cannot lose the thing perpetually in which he disclaims, shall not be suffered to disclaim. An abbot cannot disclaim, nor a bishop; for he cannot divest the right out of the church. Baron and feme may disclaim for feme. But if the baron have nothing but in right of his feme, he cannot disclaim. (*Vin. Abr. Disclaimer, (C.) pl. 1, 2, 3, 4, 5.*)

"Infant or feme covert may, at full age, or discoverture, waive lease or gift made to them during coverture or non-age." (*Vin. Abr. Waiver, (B.) pl. 3. 1 Inst. 23.*) There the lease and gift were voidable at the election of the infant or feme covert only.

In *Cruise's Dig. tit. 32, Deed, sect. 1*, it is said, that deeds may be avoided in several ways and for several reasons: "Thus, in the case of a deed poll, the grantee may

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disclaim the estate intended to be given to him, in which case no estate will vest in him." This proposition, in its terms, implies that if he does not disclaim, the estate will vest in him.

Much learning upon this subject is to be found in *Buller and Baker's case*, (3 *Coke*, 25.) In page 26, it is said, if *A.* makes an obligation to *B.*, and delivers it to *C.*, to the use of *B.*, this is the deed of *A.* presently. But if *C.* offers it to *B.*, there *B.* may refuse it *in pais*; and thereby the obligation will lose its force. If a jointure of lands be made to a woman after marriage, she may waive this after her husband's death, and take her dower. (3 *Coke*, 27. Vid. also *Jac. L. D. tit. Waiver and Disclaimer.*)

To test the case at bar by these principles. Had Mrs. *Fischer*, on the 12th of *October*, 1824, when this disclaimer was executed, an election whether she would accept or refuse the grant, after a lapse of 24 years from its date; and after the death of one of the grantors, without a delivery of the deed? Admitting that she originally had the right of election, she was bound to exercise it within a reasonable time; and if she did not, the law would determine it for her. It would not suffer the deed *to remain in abeyance*, if the expression may be allowed, for such a length of time.

But it will be observed in all the cases which have been cited, that no act remained to be done by the grantors. The conveyances or deeds were complete and perfect, depending solely on the election of the grantee, whether they should take effect or not. Not so here. The deed had never been delivered; and the delivery of a deed is the act of the grantor. The grantee had acquired no right, which she might waive or defeat by a disclaimer. If she had elected to take the deed, it would have been ineffectual, unless the grantors then chose to deliver it; and if they had, it would have taken effect in consequence of the delivery, and not of her election. The instrument of the 12th of *October*, 1824, therefore, which is called the *disclaimer* of Mrs. *Fischer*, determined no right whatever. It is a mere statement under her hand and seal of certain

facts, which show that the deed of the 13th of *March*, 1800, from *Sebastian* and *Ann Vischer* to her, was void and inoperative; not in consequence of her election to consider it so; but on account of a defect which she had not the power to remove or remedy. Such an instrument cannot be considered "*a deed, conveyance or writing, of, or concerning any lands, tenements or real estate, within this state;*" within the meaning of the act of the 12th of *April*, 1813, (1 R. L. 369,) which allows such deeds, conveyances or writings to be recorded. It does not profess to convey or transfer any interest in land: and it is not a *writing of, or concerning any lands*, in any other or different sense than the testimony of a witness, in an ejectment suit reduced to writing, and signed and sealed by him.

I am therefore of opinion, that that instrument was not sufficiently proved to entitle it to be read; and if its execution had been duly proved, that it was incompetent evidence. *Mrs. Vischer* should have been produced as a witness by the plaintiff. The defendant was entitled, not only to have her speak under the sanction and solemnity of an oath; but to the benefit of a cross-examination. On that ground, therefore, a new trial must be granted.

The judge decided correctly upon the subject of adverse possession: that the tract H. being a large tract of land subdivided into different lots, the occupancy of any one of the lots would not give a constructive possession, or create an adverse possession of other parts of the tract. (*Jackson v. Woodruff*, 1 Cowen, 276.) And as lot number 12, the premises in question, was not actually possessed at the time of the marriage of the lessors of the plaintiff, there was no adverse possession to bar the right of the lessor, *Ann Ten Eyck*. This question has been repeatedly decided by this court. Indeed, the point was abandoned by the defendant's counsel upon the argument.

New trial granted.

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TAYLOR & OTIS against BULLEN.

A promise to warrant the collection of a note and pay the promisee all costs on all suits legally commenced for its collection, cannot be enforced, unless a suit be commenced, or a legal excuse for not doing so is shown.

The commencement of a suit is a condition precedent.

Whether the non-performance or happening of a condition precedent to a right of action can be excused so as to give the right, by any thing short of the act of the opposite party? Quere.

On a promise to warrant the collection of a note from the maker, and pay all costs of all suits legally commenced for its collection; the attempt to collect being a condition precedent; it is

no excuse for

not making the attempt, that the maker died intestate before the note fell due; and that no one had taken out letters of administration upon his estate.

ON error from the C. P. of *Madison* county. In that court, *Bullen* declared against *Otis*, impleaded with *Taylor*, that on the 4th of *December*, 1817, *Stroud* made his note for \$67,50, at two years, payable to *Taylor* or bearer; that on the 6th of *May*, 1819, the defendants below, for a valuable consideration, assigned the note to the plaintiff below; and for value received, promised him to warrant the collection of the note, and to pay him all costs on all suits legally commenced for its recovery. The 1st count then charged, that on the 20th of *September*, 1819, *Stroud* died intestate, insolvent, and no letters of administration of his estate had ever been granted. The 2d count was, that *Stroud* died intestate, and no letters of administration had ever been taken out, whereby it was impossible to commence any suit. To these were added the money counts.

Plea. 1st. the general issue; 2d. to the 1st count, that *Stroud* died seised and possessed of a large real and personal estate, more than sufficient to pay the note, subject to, and chargeable with his debts; 3. to the 1st count, the same as the 2d plea, with the addition that the plaintiff had never commenced any suit or suits, or other proceedings against *Stroud*, or his heirs, devisees, or personal representatives, for the collection of the note; nor had the plaintiff applied to the surrogate of *Madison* county, or any other proper officer, for grant of administration of *Stroud's* estate, nor in any way or manner attempted to collect the note. 4 and 5. To the 2d count, the pleas were substantially the same as those to the 1st.

Demurrer and joinder to the 2d, 3d, 4th, and 5th pleas. The suit was commenced in the court below, in *February* term, 1824. It was continued to *June* term following, when the court below gave judgment on the demurrers thus:—"It

appears to the said court here, that the said first and second counts of the said declaration, and the matters therein contained, &c. are sufficient in law, &c. Therefore, it is considered that the said plaintiff do recover," &c. And in *February* term, 1825, the damages of the plaintiff were assessed on a venire *tam quam* at \$96,64, on the two first counts, for which the court rendered judgment with costs.

At the trial, the plaintiff proved the note, warranty, death of *Stroud* intestate, and that no letters of administration of his estate had been taken out, as mentioned in the declaration. The defendants offered to show that he left real and personal estate sufficient to satisfy the note; but the evidence was rejected by the court, and the defendants excepted.

G. C. Bronson, for the plaintiffs in error. The two first counts are bad in substance, (the second especially so,) in not averring an attempt to collect of *Stroud*, his heirs or devisees. The pleas demurred to were good. The court also rejected proper evidence. The attempt to collect, was a condition precedent; and *Stroud's* death was no excuse. If he had made no will, appointed no executor, and no letters of administration were taken out, still there was a remedy against the heir, or some one as executor *de son tort*. The plaintiff might also have applied to the surrogate, and himself taken out letters, and retained for his debt.

If the attempt to collect be a condition precedent, nothing will excuse its omission; not even the act of God. (19 *John*. 71, 2. 6 *T. R.* 210, 710. 2 *H. Bl.* 574 to 582. 1 *id.* 254. 2 *H. Bl.* 577, note. 3 *Mass. Rep.* 443. 7 *T. R.* 377. 6 *id.* 320. 1 *John.* 267.) The act of the defendants below could alone furnish such an excuse as would maintain the action. Though a defendant, sued for not doing an act, may excuse himself in many cases, yet the only excuse for not performing a condition precedent, which is to give a right of action, must arise from the act of the party sued. Beside, here was, in fact, very great delay and negligence.

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J. A. Spencer, contra. The death and intestacy of *Stroud*, were a sufficient excuse for not attempting to collect the note by a legal proceeding. The warranty was, that the note should be paid, if not collected in the ordinary course of legal proceedings. This became impossible by *Stroud's* dying intestate, and no letters of administration being taken out. That *Stroud* should be where he could be sued when the note fell due, was a condition precedent to be performed by *Taylor* and *Otis*, before *Bullen* was obliged to prosecute. He was under no obligation to prosecute any one as executor *de son tort*, or any supposed heir or devisee. A proceeding against these, must have been very hazardous and uncertain. It was not offered to be shown that any such persons resided within the jurisdiction of any court in this state, and no such facts were alleged in the pleas. If the prosecution be a condition precedent, it may certainly be excused, short of any act of ours; and this is agreed by the cases. (19 *John.* 71, 2.)

He referred to 2 *Coven*, 786, and the cases there cited, as to the construction of contracts.

Curia, per SAVAGE, Ch. J. The question is, whether the plaintiff below was not bound to prosecute those who were in possession of *Stroud's* property; and endeavor to collect the money by suit at law.

It is admitted, that the plaintiff below was bound to sue *Stroud*, or show a legal excuse for omitting to do so. And it is contended that the death of *Stroud* intestate, and no administration granted, constitute a legal excuse.

The pleas state that *Stroud* left property enough, subject to the payment of his debts, and that the plaintiff below never took any legal measures to collect the money.

The guaranty supposes, that a resort to legal measures might become necessary; and the defendants below engage to pay costs on any suits legally commenced. My construction of the guaranty is, that *Bullen* was to take the trouble of the collection, and *Taylor* and *Otis* the responsibility.

It seems to be conceded by the declaration, that if *Stroud* had left executors, or administrators had been appointed, the plaintiff must have sued them before he could resort to his guaranty.

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But if there is property enough, the law points out sufficient remedies. The plaintiff was surely bound to pursue such legal remedies as he was entitled to, before he could prosecute the defendants. Suppose *Stroud* had not died, but had gone to some other place, without this state, and had left property sufficient to pay the debt; must not the holder of the note use the remedy applicable to such a state of facts? The contract is not that *Stroud* shall remain, and be served with a *capias* in an action of assumpsit; but any suit legally commenced, was contemplated. If there was property, as is represented by the pleas, some suit or proceeding might have been instituted. Here was a condition precedent; that condition was not confined to a prosecution of *Stroud* himself. Had it been so, then indeed the plaintiff would possibly have been excused, as that was rendered impossible by the act of God, the death of *Stroud*. Even this, however, may be doubted. In *Moakley v. Riggs*, (19 John. 69,) *Spencer* Ch. Justice, says, "though the act of God, or the act of the law which renders the performance of an act stipulated to be done, unlawful, may excuse a party from a strict compliance with his contract as matter of defence, it may well be doubted whether an engagement by one to perform an act on the previous performance of another act by the other, can be enforced without showing the previous act done, or that its performance was dispensed with, or prevented by him who was to perform the subsequent act." This is in accordance with the settled law in relation to conditions precedent. In *Wood v. Worsley*, (2 H. Bl. 574,) which was an action on a policy against fire, the condition was to produce a certificate of the minister and church wardens, of certain facts. The certificate was not procured; though other evidence of the facts was; and that the minister, &c. refused without cause, to give the certificate. The common pleas held this tantamount to a production of the certificate. But the judg-

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ment was reversed in the king's bench, (7 T. R. 710;) that court holding the production of the certificate, a condition precedent, and that it was immaterial that the minister wrongfully refused. In *Roulledge v. Burrell*, (1 H. Bl. 258,) the court upon a similar point, said the matter was too clear to admit of a doubt. In *Campbell v. French*, (6 T. R. 200,) a bond was conditioned to pay certain bills of exchange, if returned from *India*, protested for non-payment. The bills were returned protested for non-acceptance; and the court held the obligors discharged, the condition not being performed, though it might have been. So here, a suit or suits, at law, might have been prosecuted, and the money collected, as is inferable from the pleas. The plaintiff has not made any effort to collect the money; and, in my judgment, his suit on the guaranty was premature. The judgment of the common pleas must be reversed.

• Judgment reversed.

JANSEN and HARDENBURGH against BALL.

COVENANT, tried at the *Ulster* circuit, April, 1825.

Whether a declaration on a deed, with profert andoyer, can be supported by showing a deed lost after declaration filed, and not produced at the trial? Quere.

The action was upon an instrument in these words and figures:

The lost deed may be received in evidence at the trial, and if there be no surprise, and the execution of the deed is not contested, the plaintiff may afterwards amend his declaration so as to make it conform to the case.

An instrument purporting to be an assignment of a judgment, when in truth there is no judgment, and by which instrument the party covenants that the judgment, as described, is due and unpaid, will subject him to an action for a breach of covenant.

The fact that there was no such judgment, if it be described as one in the supreme court, may be shown by a witness who has examined the dockets and transcripts of dockets in any one of the clerk's offices of that court; and failed to find the docket of the judgment described.

The measure of damages in an action on such a covenant, is the value of the property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit; with interest from the time when the money might have been raised by a sale.

The supreme court, on a motion for a new trial, will look into the evidence, and see whether, according to this rule, the damages are too high; and if so, they will grant a new trial, unless, within a time to be fixed by them, the plaintiff remit so much as shall reduce them to the true sum.

" Supreme court.

Amzey L. Ball }

May 20th, 1819.

v.

Abraham Van Kuren. }

Bond pen.	\$345,82
Condition,	172,91
Pliff's costs,	9,36
Deft's do.	68

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I do hereby assign, transfer and set over, for a valuable consideration, unto *Joseph Jansen* and *Abraham I. Hardenburgh* all my right, title and interest in and to the judgment as above stated, together with sheriff's fees ; amounting in all to 198 dollars 84 cents ; and warrant that all the above sum remains due and unpaid. Witness my hand and seal, this 3d Sept. 1819. *Amzi L. Ball, (L. S.)*"

The declaration alleged, that, at the above date, *Van Kuren* had sufficient property to satisfy the demand ; but that no judgment had been entered. The declaration made profert of the deed ; and oyer was prayed and given. Plea, *non est factum*.

On the trial, it appeared that the instrument declared on had been lost after issue joined ; and could not be found upon diligent search. It was satisfactorily proved that the oyer was a true copy of the original, which had been executed by the defendant. A witness testified that he had examined the docket of judgments in the clerk's office of this court in the city of *New-York* ; and the transcripts there from the clerk's offices of this court in *Albany* and *Utica* ; and found no judgment in favor of the defendant. Proof of the deed, without its production, was objected to ; and also the proof of search in the clerk's office ; the former as being inadmissible under the profert and oyer ; and the latter as incompetent, to show that there was no judgment. The objections were overruled.

Proof was then given of the amount of the defendant's property, which was lost, as a means of paying the supposed judgment ; in order to fix the measure of damages. This evidence is sufficiently stated in the opinion of the court.

The judge charged, that the measure of damages was the amount of property belonging to *Van Kuren*, which could

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have been taken under an execution ; that the property in his possession at the time of the assignment which had been sold under another execution, did not belong to him ; and should not be included in the estimate of damages ; that the plaintiffs were entitled to recover the fair value of the property that *Van Kuren* owned, from the time of the assignment until the commencement of the suit, with interest from the time the money might have been collected. Verdict for the plaintiff for \$283,33.

A motion was now made for a new trial.

G. F. Tallman, for the defendant. Proof of the loss and contents of the instrument declared on was inadmissible. (2 *Str.* 1186. 1 *Ph. Ev.* 403. 4 *East*, 585. 4 *Coven*, 124.) The evidence of examining the docket and transcripts was incompetent. The docket itself, or an exemplified copy, should have been produced. No breach of the covenant was proved. The verdict was also against evidence in the amount of damages.

C. H. Ruggles, contra, cited *Shep. Touch.* 73 ; 1 *Ph. Ev.* 157.

Curia, per WOODWORTH, J. As to the non-production of the assignment, the rule seems to be, that the plaintiff may state the loss specially ; and omit the making of a *profert* ; but here the deed was lost subsequently to the declaring. The plaintiff could not, at the time, declare specially. After a *profert* is made, the deed is supposed to remain in court ; and if denied, is kept there until it be determined. (*Shep. Touch.* 73, 4.) The case of *Smith v. Woodward*, (4 *East*, 585,) decides, that where a plaintiff declared on bond with a *profert*, on *non est factum* pleaded, secondary evidence by means of a copy, and showing that the defendant had taken away the original, and, before action brought, said he had burnt it, was not sufficient to sustain the declaration. The question there decided is not analogous. It is true, lord *Ellenborough* remarks, that if the bond were lost or destroyed after having declared on it, the plaintiff might move to put off the

trial; and amend. I incline to think it not necessary, for the purposes of justice, nor required by any adjudged case, that a party should incur such delay and expense, when it manifestly appears there has been no surprise; and the due execution of the instrument has not been made a question at the trial. Under these circumstances, I am of opinion that the plaintiff be permitted to amend his declaration, by adapting it to the case, which gets rid of the technical objection. Amendments which subserve the justice of the case, are frequently made after verdict. They are always addressed to the discretion of the court. It is perhaps safer to take this course, than to lay down a general rule, that where a deed is lost after issue joined, it shall be competent to give secondary evidence. (4 *Cowen*, 124. 3 *T. R.* 151. 3 *Taunt.* 81.) (a)

The evidence entitled the plaintiffs to recover; and I think the charge of the judge was correct.

The only remaining question is, whether the verdict was not against the weight of evidence, as to the amount of damages.

It appeared that *Van Kuren* had in his possession, (and which was reputed to be his property,) a mare, valued at \$35, a waggon, \$50, a colt, \$60, a cow and heifer \$30, and a pong and harness, \$30. *Van Kuren* testified that the waggon was left with him by his father-in-law; that he used, and afterwards sold it. He did not say who was the owner. The jury, in the absence of further proof, were justified in considering him the owner. The weight of evidence was, that the colt had not been sold, until after the assignment. The cow, heifer, pong and harness, had been sold under another execution; and left in *Van Kuren's* possession by the purchaser. The cow was subsequently redeemed.

The highest valuation of the property that might have been levied on, was \$145. The cow, being exempt from execution, is not included. From *March 3d*, 1820, (allowing 6 months to collect the money,) to *September 3d*, 1824, supposing that to be the time when the suit was

(a) *Vid. ante*, 365.

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commenced, the amount is \$45,67, making, in the whole, \$190,67. It seems to me this evidence did not authorize a verdict for a greater amount. As the damages are susceptible of calculation with considerable accuracy, I am not inclined to subject the parties to the expense of a new trial, if the plaintiff consent to remit a portion of the damages.

My opinion is, that a new trial be granted, with costs to abide the event of the suit, unless the plaintiff shall, within 20 days, remit \$92,66, parcel of the damages recovered.

Rule accordingly.

JACKSON, *ex dem.* Bradt and others, against WHITBECK.

After an exclusive and uninterrupted possession, by one tenant in common of land, for nearly 40 years, without any account with his co-tenants, a jury are authorized to presume an ouster; and an action of ejectment by his co-tenants, is barred.

The court, on a verdict subject to their opinion upon a case, may draw the same inferences as, in their opinion, a jury would be warranted in drawing from the facts in the case.

EJECTMENT, for 70 acres, in *Greenbush, Rensselaer* county; tried at the circuit in that county, *July, 1824*, before **BETTS**, (late) C. Judge.

A verdict was taken for the plaintiff, subject to the opinion of this court, on the following facts:

The lessors of the plaintiff are the children and heirs at law of *Bernardus Bradt*, and claimed the premises in question as such. The defendant claimed under *Hendrick Bradt*, who was also a son of *Bernardus*. *Bernardus Bradt* moved from the premises in question to the town of *Hoosick*, in *Rensselaer* county, about the period of the treaty of peace in 1783, leaving his son, *Hendrick*, in possession; who, from that period, until his death, about a year before the trial, occupied them, either in person or by his tenants, claiming them as his own. *Bernardus*, the father, died about forty years before the trial. *Hendrick* always openly asserted his title to the premises. He said that his father had given them to him; that he directed him to get a deed drawn, and he would sign it; but

Whether a possession, claiming title, under a parol gift of land from the owner, is such an adverse possession as will bar an ejectment? *Quere.*

he was young, and did not look abroad, and neglected to do it. When the farmers' turnpike was laid through the farm, *Hendrick* claimed the damages done to the farm as his own. His father and sisters lived in *Hoosick*, between 30 and 40 miles from the premises, ever after the father removed there in 1783; and the witnesses never heard the title of *Hendrick* questioned, or of any claim to the premises on the part of his brothers and sisters, or of any other person, until suits or proceedings in partition were instituted about 15 years before the trial. But by whom those proceedings were instituted, or in what manner they were terminated, was not stated in the case.

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A. Van Vechten, for the plaintiff..

J. V. Henry, contra, cited *Cowp.* 217; 1 *Caines' Rep.* 84; *Adams on Eject.* 55.

Curia, per SUTHERLAND, J. Without determining whether a claim of title under a parol gift, is sufficient to lay the foundation of an adverse possession, (*vid.* 13 *John.* 120,) it appears to me, that, admitting the premises in question to have descended to the children of *Bernardus Bradt*, as tenants in common, the evidence in the case warrants the presumption of an actual ouster of his co-tenants by *Hendrick*. Here has been an exclusive possession, under claim of title, for forty years, without any assertion of right, or claim to any portion of the profits of the premises on the part of his co-tenants; although they all resided in the same county, within 40 miles of the premises. In *Doe v. Prosser*, (*Cowp.* 217,) it was held that 36 years sole, and uninterrupted possession, by one tenant in common, without any account to, or claim by his companion, was a sufficient ground for a jury to presume an actual ouster of the co-tenant. Lord *Mansfield* says, "the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companions; because such possession is not adverse to his right, but in support of their common title; and by paying him his share, he acknowledges him to be tenant. Nor is a refusal to pay,

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without *denying his title*, sufficient. But if, upon demand by the co-tenant, of his moiety, the other refuses to pay, and denies his title, saying he claims the whole, and will not pay, and continues in possession; such possession is adverse, and *ouster* enough." "In this case," he continues, "no evidence whatsoever appears, of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of a title in them, or in those under whom they would now set up a right. I am, therefore, clearly of opinion, that an undisturbed and quiet possession, for such a length of time, is sufficient ground for a jury to presume an *actual ouster*." *Aston*, J. says, "in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand, or claim of any account by the other; and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits, without any account for near forty years, is not?" *Willes* and *Ashurst*, Js. expressed the same opinion. That case was, in no respect, a stronger one for the defendant, than the one at bar.

So in *Van Dyck v. Van Buren*, (1 *Caines' Rep.* 84,) the same doctrine was held; that a sole possession under claim of right for 40 years, by one tenant in common, amounts to an ouster; not that the jury might presume it from this fact; but that the law raises the presumption; and the jury were not at liberty to resist it. Whether it be a presumption of *fact*, to be found by the jury, as was held in *Doe v. Prosser*, or a presumption of law to be drawn by the court, as was said in *Van Dyck v. Van Buren*, is not material in this case; for the verdict being subject to the opinion of the court, we are substituted for the jury, and have the right to draw the same conclusions from the testimony, which the jury, in the opinion of the court, would have been authorized to draw.

We are, therefore, of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

LUCAS *against* the JEFFERSON INSURANCE COMPANY IN
THE CITY OF NEW-YORK.

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ASSUMPSIT on a policy of insurance; tried at the *New-York* circuit, July 13th, 1826, before EDWARDS, C. Judge; when the following facts appeared:

The defendants, by a policy dated August 23d, 1824, insured the plaintiff against loss by fire to the amount of \$4000, on certain cotton and woolen machinery, at *Mechanic Ville*, Saratoga county. The *Chatham* and *Ætna Fire Insurance Companies*, also insured the plaintiff on the same property; the former to \$5,500, the latter \$6000. A loss had been sustained by fire. The evidence on the part of the plaintiff, made the amount about \$20,000; and that on the part of the defendants, between nine and ten thousand dollars. The policy under-written by the defendants, contained the following clause: "In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured shall bear to the whole amount insured on the said property." The *Chatham* and *Ætna* companies had each paid the amount of their insurance, deducting one sixth, making together, \$9583.34. These were voluntary payments without suit, by arrangement between the parties.

The judge charged the jury, that in ascertaining the amount to be recovered, they were not to take into con-

Construction of the clause in a policy of insurance against loss by fire, providing for only a rateable payment, in case of other policies on the same subject.

Where there are several policies containing this clause, they are all, and each, liable to pay the rateable portion mentioned in the clause, tho' it happen that some have paid more than their share; and even enough to cover the whole loss, and this, whether they had knowledge of all the policies at the time, or not.

There is no contribution between policies containing this clause.

Where, however, there are several policies, and one only contains this clause, and the others pay to the extent of their subscriptions, which is more than their rateable share, this will be a defence *pro tanto*, in an action against the under-writers on the policy containing that clause; and if the policies without the clause, have paid enough to cover the loss, it is a complete defence for the others: for they are liable to contribute to the under-writers who have paid.

And so where all the policies are without this clause.

If under-writers, sued on a policy containing this clause, seek to defend themselves on the ground that other policies, without it, have paid the whole loss, or more than their rateable share; it lies with them to show affirmatively, the other policies without the clause. This is matter of defence; and the absence of the clause in the other policies will not be intended.

Where there are several policies on the same subject, without this clause, it is double insurance; they are all deemed but one policy, the insured can recover but one indemnity; and contribution prevails between the insurers.

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sideration the payments made to the plaintiffs by other insurance companies, provided those companies were aware of the existence of all the policies on the property at the time they paid the plaintiff for his loss; and made the settlement solely with the view of discharging the claim of the plaintiff against themselves. And that if the value of the property insured, and the amount of the loss by fire, were equal to all the sums insured by the different underwriters, the verdict, if the jury should think the plaintiff entitled to recover, ought to be for the face of the policy, with interest. But if the value of the property insured, and the loss by fire, were less than the aggregate amount of the sums insured by the different underwriters, the verdict ought to be only for such a proportion of the loss or damage sustained by the plaintiff, as the amount insured by the defendants, bore to the whole amount insured.

To this charge, the defendants excepted; the judge sealed a bill of exceptions; on which the defendants now moved for a new trial.

J. Platt, for the defendants. The clause as to other insurances, differs from the clause relating to those in marine policies. By this, the loss must be distributed among all, in proportion to the sum insured by each. If, therefore, the whole loss was paid by the other offices, the judge should have charged for the defendants, leaving the other companies to seek contribution. No act done by the other companies, could deprive the defendants of a right to have the loss apportioned among all. It does not appear that their policies contain any clause providing for the case of double insurance. The object of insurance is indemnity; and if the plaintiff was fully paid, this purpose was answered. The plaintiff can claim nothing farther against any underwriter. He cited 1 *Marsh. on Ins.* 1; *id.* ch. 15, p. 529; 1 *Am. ed.*; *id.* 115, 119, 598, 602; 2 *Burr.* 1198; 1 *Bl. Rep.* 276; *id.* 416; *Beaves*, 242.

G. Griffin, contra. Contribution generally exists only where there is a joint liability, as in case of several sureties or partners. It is the same in the law of insur-

ance. (*Marsh. on Ins.* 148.) But if an individual pays my debt, without request, he cannot call on me to refund. The error of the other side, lies in considering this as a case of double insurance. It is not so. The language of the policy, precludes the idea of joint liability. The authorities relied on by the other side, relate to marine policies, which are signed by different under-writers, till they are filled up, the names often being all on the same instrument. This, unexplained, creates a joint obligation; and several suits upon a single policy will be consolidated. The payment by the other companies, must be considered, in reference to this suit, as merely gratuitous; and cannot make the defendants liable to contribute. (2 *Com. on Cont.* 151.) If we have received too much of them, their remedy is against us; if they paid by mistake. If wittingly, they must abide the loss. (4 *John.* 240.) We ask no more than indemnity. The contract is to pay a rateable indemnity. If the other policies did not contain the clause as to double insurance, it lay with the defendants to show this. The presumption is, that they were all alike. All containing the same provision; how can either of these under-writers avoid their express agreement to pay, by setting up a pretence that they are liable to contribution. This is superseded by the clause in question.

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Curia, per WOODWORTH, J. No objection was raised on the argument, as to the finding of the jury; nor can this be questioned on a bill of exceptions. It was contended that the charge of the judge was erroneous, on the ground that the defendants were entitled to the benefit of the payments made by the other companies; and that, inasmuch as the whole of the loss sustained, had been already paid, the defendants were entitled to a verdict. It is well settled, that upon a double insurance, though the insured is not entitled to two satisfactions, yet in the first action, he may recover the whole sum insured, leaving the defendant to recover a rateable satisfaction from the other insurers. (1 *Bl. Rep.* 416.) In such cases, the two policies are considered as making but one insurance. They

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are good to the extent of the value of the effects put in risk. The insured may sue the under-writers on both policies; but he can only recover the real amount of his loss, to which all the under-writers shall contribute in proportion to their several subscriptions. (*Marsh. on Ins. B. 1, ch. 4, s. 4, p. 116, or Condry's ed. p. 146.*)

In the case before us, it is said, that the clause in the policy, as to prior and subsequent insurances, differs essentially from the like clause in marine policies. I have looked at some of the printed forms of policies against fire, in the books; but have not discovered any such clause. There is no direct evidence, to show that the policies made by the *Chatham* and *Ætna* offices were similar to this. Whether they are or not, the parties in this action, must be governed by the contract they have made. That is express. Suppose the plaintiff had not received any thing from the other offices; could he recover the whole amount of the defendants' subscription, provided his loss was equal to that amount? In a policy not containing the clause referred to, the plaintiff would be entitled to recover the sum insured, leaving the defendants to seek contribution from other insurers. Here there is a stipulation against that course, in very explicit language: "The insured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured bears to the whole amount insured on the property." The defendants did not intend to be liable for the whole of their subscription in the first instance, and then seek indemnity by way of contribution. If, notwithstanding this clause, the defendants should voluntarily pay the whole amount of their subscription, towards the plaintiff's loss, I do not perceive on what ground they could claim contribution. The answer to such a claim, would be, that they paid in their own wrong; and *volenti non fit injuria*. If there is redress, it must be against the party who received more than he was entitled to demand. The principle of contribution, can only be enforced where the party paying, was under a legal obligation to pay. If the policies of the *Chatham* and *Ætna* companies, are similar to

this, the defendants have no concern with the amount paid by them. In that case, they acted for themselves; and if they have paid more than the plaintiff could by law recover, it was done voluntarily. In the present case, the amount of the plaintiff's loss is controverted. He claims much more than the defendants are willing to admit. The weight of evidence on this point, may be as contended for by the defendants; but still, it is a disputable fact. The *Chatham* and *Ætna* offices may have chosen to pay on the exhibition of the plaintiff's proof, in preference to a protracted litigation. They may have erroneously considered the damages much greater than they really were. They acted voluntarily, and for themselves. This was submitted to the jury, and they have passed upon it. The act of settling for themselves, raises a presumption that the different policies were alike; and that no claim for contribution was contemplated as against each other.

On the supposition that the policies of the *Chatham* and *Ætna* companies, did not contain the clause in question, the plaintiff might recover the amount of their subscriptions, if necessary to satisfy his loss; and in such case, I apprehend, it would be competent for the defendants, to show the plaintiff had received satisfaction. As indemnity can only be claimed, there is no right of action after it is obtained. If the policies of the *Chatham* and *Ætna* offices, were such as to entitle the plaintiff to recover of them all their subscription, if requisite to pay his loss, then their right to contribution against the defendants would be undoubted. The clause in the defendants' policy would not affect that question; but would apply, when they should be prosecuted by the plaintiff, so as to protect them against his claim beyond a rateable proportion of the loss. If the loss has been already recovered, and paid, the claim for a rateable proportion is necessarily extinguished. The *Chatham* and *Ætna* offices, incurred no risk in making payment, provided the clause is not in their policies; because it is conceded by the defendants, that the loss was at least equal to those payments. On this principle, the defendants are liable to contribute a portion

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to those companies. If the amount received, was to be taken into consideration on the trial, the duty of the jury would have been, to ascertain the whole amount of loss; and if it exceeded the sums paid, then, after deducting the payment, to find a verdict against the defendants for the balance, provided it did not exceed the proportion of the whole loss, which, according to the contract, the defendants ought to bear; and if the amount of the loss remaining unsatisfied, was less than such rateable share of the whole loss, then the verdict should have been for such balance. In the action for contribution, an adjustment would be made between the parties on these principles. In the view thus taken, I think that part of the judge's charge incorrect, which directed the jury not to take into consideration the payments made to the plaintiff, by the other insurance companies, provided those companies were aware of the existence of all the policies on the property at the time; and made the settlement solely with a view of discharging the plaintiff's claim against themselves. If the *Chatham* and *Ætna* companies, were liable to the amount of their subscriptions, which I apprehend they were, unless protected by a clause, like that in the defendant's policy, their knowledge of other policies was immaterial. Whether they had knowledge or not, the plaintiff was entitled to recover against them; and if so, they had a remedy over against the other insurers. Neither can the fact that they settled to discharge the claim solely against themselves, defeat such remedy over, if it appears they have not paid more than the loss sustained. Suppose those companies had settled under a belief that their proportion of the loss would be equal to the amount paid; and therefore, did not, at the time, contemplate a recovery against others for a portion of it. This would not invalidate their right to claim contribution, when it is shown that they had paid more than their relative proportion. In this point of view, the charge was calculated to produce a result unfavorable to the defendants. The verdict was for the plaintiff; for how much does not appear; probably for the whole sum insured. A new trial should be granted, if the

*Chatham* and *Ætna* companies were legally bound to pay what the plaintiff received. But if those policies, were like the one in question, the defendants can derive no benefit from the payments made. They should be put out of view on this trial; and if so, that part of the charge on which I have commented, was incorrect as respects the plaintiff. The defendants have no cause to complain. It was allowing them the benefit of the payments, if the jury were satisfied of certain facts submitted to them; whereas, they should have been instructed not to regard the payments, if the policies subscribed by those companies, bound them only to pay, in the first instance, a rateable proportion of the loss.

The question then is, what was the form of the *Chatham* and *Ætna* policies? Neither party has adduced any express testimony to this fact. On whom devolved the necessity of showing what those policies contained? Certainly not the plaintiff. His case was made out without this. He claims of the defendants, the proportion they are bound to pay under their policy for the whole loss. They contend it has been paid by other companies. But to make that defence available, it must be shown, either that the companies paid in fact a sum of money which was received in full satisfaction of all the insurances; or that the amount paid by them, was in pursuance of a policy which authorized such payment. The first is not pretended. As to the second, the court is left to conjecture. It is a fact, on which the defence rests. There is no sufficient ground for presumption, that those policies did not contain the clause in question. The defendant's policy contains it. Some of the forms in the books, do not. We cannot assume the fact, that the policy differed from the one in this case. I think it may rather be presumed they are alike. The settlement made between the plaintiff and the companies, strengthens the presumption. They each deducted one sixth. They certainly had no right to make that deduction, if the loss exceeded the sums insured by them. The plaintiff claimed considerably more. It is not probable the plaintiff would have consented to a deduction of one sixth, if the policies

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were so drawn as to allow him to recover the whole sum insured. Be this, however, as it may, I think the defendants ought to have shown the other policies were different, in order to avail themselves of the payments. The remainder of the charge is correct. If the loss was equal to all the sums insured, the plaintiff was entitled to the face of the policy. If less, to a proportion only. Whether the jury have found too much, or too little, is not before us. The motion for a new trial must be denied.

New trial denied.

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THE PEOPLE *ex rel.* INGERSOLL *against* GAREY.

The legislature have no power to shorten the constitutional term of office of a justice of the peace.

This cannot be done indirectly, by the erection or division of counties.

Where a town is transferred from one county to another, or a new county made out of several towns, the justices of these towns continue to hold their offices, as justices of the town or towns in the new counties.

The legislature have

power to enlarge or contract the territorial jurisdiction of justices of the peace.

The office of justice of the peace is, under the new constitution and the statute which it adopts, (*sess.* 41, *ch.* 60, *s.* 2,) a town office, though it has county powers

The appointment of more than four justices in a town would be void.

ON demurrer to the replication. On information in nature of a *quo warranto*, against Garey, calling upon him to show by what warrant he acted as a justice of the peace of the county of Orleans, he pleaded the statute to erect a new county from part of the county of Genesee, by the name of Orleans; passed November 12th, 1824, (*sess.* 47, *ch.* 266,) providing that all that part of the county of Genesee comprising the towns of Gaines, Barre, Murray, Clarendon, Ridgeway, Yates, and Oak Orchard, in the county of Genesee, should, from and after the 1st day of January, 1826, be a separate and distinct county, by the name of Orleans; and that it should be the duty of the supervisors and judges of Orleans to meet on the 3d Monday of May, 1826, and nominate justices for that county, proceeding in the same manner as in other cases; and that the former justices in that county should hold until the new appointments; that by another statute passed April 15th, 1825, (*sess.* 48, *ch.* 181, it was provided that the

county of *Orleans* should be a distinct county from the time of the last mentioned act, instead of the time mentioned in the first ; and that the town of *Shelby*, in *Genesee* county, should be annexed to *Orleans* ; and that the time of appointing justices should be on the *3d Wednesday in May, 1825*. That the judges and supervisors met on the last mentioned day, and nominated the defendant, a justice of the peace of *Shelby*, who took the oath of office ; and acted as justice of the peace for the new county, during the time mentioned in the information. Replication, that the town of *Shelby*, on and before the *3d Tuesday of February, 1823*, was a town of *Genesee* county, when the judges and supervisors of *Genesee* county nominated two justices for that town ; but disagreeing as to the other nominations, the judges nominating the relator, he with a fourth justice were selected by the governor as justices of *Shelby*. That the commission of the peace for *Genesee* was filled. That the four justices for *Shelby* were, on the *27th of February, 1823*, duly sworn ; and took upon themselves the office, and entered upon its duties, *Shelby* being then a town of *Genesee* county ; and so continued till after the supposed appointment of the defendant ; that they are now such justices of *Shelby*, and still continue to exercise their offices in that town.

General demurrer and joinder.

*T. J. Oakley*, in support of the demurrer. The legislature had power to erect the new county ; and separate *Shelby* from *Genesee* county ; and make it a part of *Orleans*. By the separation, the duties and powers of the former justices ceased. They could not be exercised out of the county for which they were appointed. They could not act as members of the general sessions in *Orleans*, or do other county duties. Can their offices be retained in part ? The locality as to appointment was intended merely as a measure of expediency, to limit their number ; not to confer powers on them as town officers. Their powers are generally co-extensive with the county ; and when their town is taken from the county for which they were ap-

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pointed, those powers cease from non-residence in that county; and cannot exist in the new one, unless continued by the legislature. The constitutional tenure for four years, is dependent on the county remaining entire, and the justices continuing in their town, as a part of it. Again, the appointment of the new justices is valid, even if the old ones are to continue in office. The legislature may increase the number of justices in any town or county. Every person is deemed to assent to an act of the legislature.

*Talcott, (attorney general,) contra.* We rely on the case *Ex parte M'Collum*, (1 Cowen, 550,) as conclusive. The justices have a right to hold their offices four years, unless sooner removed in the manner pointed out by the constitution. The assent of no one is to be presumed to an unconstitutional statute. The only inquiry is, whether the legislature have power to put the relator in such a situation that he cannot hold his office, before his constitutional term has expired. This point is directly decided in the case cited. If the legislature may increase the number of justices, they have not attempted to do so. The act contemplates the old number of four. The annexation of an old town to a new county, is not analogous to the removal of a justice from his former residence. This is voluntary. He incapacitates himself. The legislature could give no power to the judges and supervisors of *Orleans*, beyond supplying vacancies among the old justices as they should arise. So far, and no farther was this act constitutional. Probably this alone was intended.

*J. V. Henry*, in reply. *Ex parte M'Collum* decides no more than that the old justices may be transferred by statute with their town, to another county. The provision in the constitution that these officers shall not be removed except in a certain way, does not deprive the legislature of the power to erect new counties and alter old ones. If that remains, the incidental right of officering those counties is essential. If the legislature, as is admit-

ted in *M'Collum's* case, can contract or enlarge the jurisdiction of justices in the exercise of that right; does it not follow, that they may take it away? But if the act cannot otherwise have effect, the court will construe it as creating an additional number of justices.

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*Curia, per* SUTHERLAND, J. It is contended, by the counsel for the defendant, 1. That by the separation of the town of *Shelby* from the county of *Genesee*, and its annexation to the county of *Orleans*, the duties and powers of the justices of the peace of that town ceased; and could not be exercised out of the county, in and for which they were appointed; and 2. Admitting that the old justices still retained their powers, that the appointment of the defendant was valid, the legislature having power to increase the number of justices in any town or county.

The power of the legislature to increase the number of justices in any town or county, is conceded. But it is contended, and we think with entire success, that there is nothing in the acts creating and organizing the county of *Orleans*, from which the slightest inference can be drawn that such was their intention in this case. The number of justices to be appointed in any town, being limited to four, by a general law of the state, (*sess.* 41, *ch.* 60, *s.* 2,) every presumption is against the intention of the legislature, to vary that law in relation to a particular town or county. The reason for a departure from the general regulation, must appear on the face of the act, or the intention be otherwise clearly expressed, in order to operate as a modification or partial repeal of it. But here such intention is clearly negatived by an express provision, that the (then) present justices of the peace in the new county shall hold their offices until the new appointments are made. (§ 14.) After they are made, then, so far as depends upon the provisions and operation of this act, the former justices must cease to hold their offices.

The question then resolves itself into the inquiry, whether it was within the constitutional power of the legisla-

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pointed, those powers cease of this case, to dismiss the county; and cannot exist to direct the election of new by the legislature. term for which they were elected years, is depende It is supposed to be very clear, that the justices the towns which were erected into the Again, the ceases, ceased to be justices of the county of if the o' which those towns belonged at the time of may E. Residence within the county is indispensable to the jurisdiction of this class of magistrates; and the legislature, possessing the power of erecting new counties, from parts of counties already organized, necessarily have the right of separating one or more towns from the county to which they were originally attached, and as a consequence, of depriving the magistrates residing in those towns, of the jurisdiction which they originally possessed over the territory from which they have been separated.

The power of the legislature to erect new counties, has been exercised from the foundation of the government; and is expressly recognized in the 7th section of the first article of the amended constitution. The justices of such towns must, therefore, become magistrates of the new county to which they are attached, or lose their offices entirely.

The mode of appointment to, and the tenure of their offices, is particularly specified in the 7th section of the 4th article of the constitution. It is there declared, "that every person appointed a justice of the peace, shall hold his office for four years, unless removed by the county court, for causes particularly assigned by the judges of the said court." It was the intention of the framers of the constitution, to make this important class of judicial officers, entirely independent during the period for which they were chosen. No authority was conferred upon the legislature, of interfering with them under any circumstances. They were made amenable for misconduct, not to the legislature, but to the judges of the county court, a co-ordinate branch of the domestic tribunal, from which they received their appointment. All direct control on the part of the legislature, being thus carefully guarded against,



lation to these officers, it would be strange indeed, if power of removing them from office at pleasure, should be found to belong to the legislature, as incident to their acknowledged power, of dividing old and erecting new counties. Every presumption is against it; and in expounding that part of the constitution, and those laws which are applicable to the subject, that rule of construction should be adopted which is least favorable to such a pretension.

It is contended that justices of the peace are strictly county officers, and that when separated from the county for which they were chosen, their powers must cease in that county, on account of their non-residence, and cannot exist in the new county to which they are attached, because they were not elected or chosen for that county. If, by county officers, be meant officers who possess some powers co-extensive with the county, it is conceded that justices of the peace are such. But according to that definition, the supervisors and constables of the different towns, are county officers also; and would, by the same argument, lose their offices whenever the towns to which they belonged were set off to a different county. The most important duties of the supervisors of each town, are as members of the board of supervisors, and relate to the county generally, and not to their respective towns. They settle and allow all accounts chargeable against the county, and determine what sum ought to be raised for defraying the public and contingent charges of the county. They determine each town's proportion of the county charges; and direct such sums to be raised, and issue their warrants to the different collectors for that purpose. They audit and allow the accounts of the county treasurer, and it is to them that the bond for the faithful performance of his duties is given. They receive conveyances of land for the use of the county; they superintend the county court house and jail, and direct such repairs as may be necessary.

A constable also, has the same right to execute process in every town in the county, as in that in which he was

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In this respect, his territorial jurisdiction, then, is not extensive with that of the sheriff. supervisors and constables are town officers. To determine whether a particular office is a county office.

It does it depend upon the mode of appointment. Any considerations may render it expedient to confer the power of appointing local officers upon bodies of men not to be affected by the exercise of those powers; and by adverting to the debates in the convention upon that part of the amended constitution which provides for the appointment of justices of the peace, it will be perceived, that the power of appointment was not conferred upon the supervisors and judges of the county court, because justices were considered county officers. The principal objection made to the election of these magistrates by the different towns, was, that deriving their offices from those among whom their powers were principally to be exercised, it was apprehended that they would not be exercised with impartiality and firmness. It was conceded that the inhabitants of the different towns were principally interested in the character and qualifications of the magistrates of their town; that they were essentially local magistrates, and that if it were not for the reason which has been adverted to, their selection ought to be left to the different towns. They are, undoubtedly, in the exercise of the largest and most important part of their duties, practically and substantially local officers. The respective towns have a deep interest in the character and qualifications of their own justices, and very little in those of the justices of any other town.

I am also inclined to think, that by the act of March 27th, 1818, (sess. 41, ch. 60,) justices of the peace must reside in the towns for which they were appointed. The 2d section of that act provides, "that it shall not be lawful to appoint any more than four justices of the peace in any town in this state." The object of the legislature was not merely to prescribe a rule by which the aggregate

number of justices of each county should be limited. If it had been, a different phraseology would have been adopted. They would have said at once, that no more justices shall be appointed in any county, than at the rate of four for each town therein. This would have left it in the discretion of the appointing power, to apportion them among the towns, in such manner as they might deem expedient. Have they that discretion under this law? Can they locate all the justices in the county in one town? It cannot, I apprehend, admit of a question, that such appointments would be absolutely void, except as to the four first named. And why would they be void? Not because the law declares that it shall not be lawful to appoint *all the* justices for the county in one town; but because it enacts that no more *than four shall be* appointed in any town. Whether the excess be great or small is not material. Whatever it is, is a violation of the act, and void *pro tanto*. If there is any discretion upon this subject left to the appointing power, it is an unlimited discretion. The certificate of the supervisors and judges, which, by the act of *April 12th, 1822*, is directed to be filed in the county clerk's office, must, I apprehend, specify the town for which the respective individuals are appointed. Under the old constitution, when justices were appointed by the council of appointment, their commissions undoubtedly, subsequent to the act of 1818, specified the town for which they were appointed.

The object of the act was, not only to limit the aggregate number of justices, but to secure a proper distribution of them among the different towns. Four were supposed to be equal to the wants of the largest towns; and it was left to the discretion of the appointing power, whether they would appoint that number or less, where the circumstances of the town did not require so many.

If all the justices of one town should remove into the adjoining town, I apprehend their offices would be vacated. They would cease to be justices in the town for which they were appointed. If it is unlawful to appoint more than four justices for any one town, it would seem to fol-

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low, that no one town can lawfully have more than four justices.

The article of the constitution, prescribing this mode of appointing these officers, recognizes the existing law limiting their number, and speaking of them as justices to be appointed in the different towns.

Although, therefore, their criminal and civil jurisdiction, for many purposes, is co-extensive with the county, yet the constitution and laws recognize them as attached to particular towns; and the practical exercise of their powers is confined almost exclusively to the towns in which they reside. When, therefore, the circumstance of a town being separated from the county to which it formerly belonged, renders it necessary to determine, whether the magistrates of the town can retain their offices, in the new county to which their town is attached, I think we may consider them as substantially town officers, and as retaining their authority during the period prescribed by the constitution, in whatever county the legislature may be pleased to place their town.

The constitution says they shall hold their offices for four years. The law of 1818 says, according to what is deemed its just construction, that they shall hold them only in the town for which they were appointed. It would seem necessarily to follow, that they become magistrates of whatever county their towns are attached to. In the case of *M'Collum*, (1 *Coven*, 550,) it was held that the legislature had power to enlarge or contract the territorial jurisdiction of justices of the peace. In that case, the county of *Wayne* had been erected from parts of *Ontario* and *Seneca* counties; and the question before the court was, whether the magistrates in the towns of which the county was composed, who were chosen while those towns belonged to the counties of *Ontario* and *Seneca*, became justices of the peace in the new county of *Wayne*. The only distinction between that case and this, is, that there the act organizing the county of *Wayne*, declares "that every person who shall have been appointed a justice of the peace, in and for the counties of *Onta-*

*rio and Seneca, and who shall now reside within the county of Wayne, shall, by virtue of this act, be and remain a justice of the peace, in and for the county of Wayne, for the same time, and with the same powers and authority, in the town in which he shall reside within the county of Wayne, as he would have had in the counties of Ontario and Seneca, if this act had not been passed."*

In the case now before the court, the election of new justices is directed; and that the old justices shall hold their offices until the new appointments are made. But it is conceived that these different provisions do not essentially vary the two cases. It is not in the power of the legislature either to extend or shorten the duration of this office. They may enlarge or diminish the territory over which its powers are to be exercised. But the office itself exists independently of, and above them.

In the case at bar, all the towns composing the new county, were taken from the county of *Genesee*; so that the justices of those towns, if they retain their offices, acquire no additional territorial jurisdiction; nor do they become the magistrates of a people who had no voice in their election. The objection, therefore, which was urged with some plausibility in the *Wayne* county case, that magistrates were imposed upon the county, in whose election a portion of the county had no voice, does not apply here. But if it did, the decisive answer is this: that it is a condition imposed by the constitution itself, and not by the legislature, upon every new county, that the justices of the peace, in the towns of which it is composed, shall retain their jurisdiction, until the constitutional period of their offices shall expire. The power of the legislature to erect new counties is subject to this limitation. It must be exercised in subordination to the imperative provision of that instrument, that justices of the peace shall hold their offices for four years, unless removed for misconduct.

Before the amendment of our constitution, justices of the peace were appointed by, and held their offices during the pleasure of the council of appointment. The ef-

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sect of transferring a town from one county to another, upon the magistrates of that town, never was drawn into discussion, at that time ; because, from the tenure of the offices, and the character of the appointing power, there were no obstacles or objections to its exercise at any time. The fact, therefore, probably is, that new appointments were made, whenever new counties were created. And the offices being held at the pleasure of the appointing power, the exercise of that power could never be impeached by the party removed or superseded. There being no constitutional obstacle to the exercise of the appointing power, it is conceived also, that it may have been competent for the legislature to require that power to be exerted, whenever so important a change took place in the organization of the state, as that which was produced by the erection of a new county.

We are sensible of the difficulties which surround this question ; and it is probable many may exist, which have not been anticipated and answered by the court. But it seems to us there can be no mistake in the opinion which we have expressed, that it is not in the power of the legislature to shorten the constitutional term of a justice of the peace ; that the office must endure unless vacated by the act of the incumbent, for four years ; and that the only difficulty is in determining the territorial limits within which it is to be exercised. For the reasons which have been assigned, we think it must be the county in which the officer is placed under the new organization.

Judgment for the plaintiffs.

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HALL against DAGGETT and KENSETT.

Hall  
v.  
Daggett.

ON error from the C. P. of the city and county of *New-York*.

The action in the court below was trover by *Daggett* and *Kensett* against *Hall*, for certain cases and boxes of provisions preserved fresh. The plaintiffs produced, on the trial, an agreement between themselves and the defendant below, dated *April 15th, 1822*, by which they agreed to carry on the business of preserving fresh provisions, which they warranted to keep sweet and good for any voyage or climate; and agreed, in consideration of the use of \$600, received of *Hall*, that *Hall* should be the only agent for selling the provisions in the city of *New-York*, for 10 years; and should be allowed 20 per cent. on all sales made by him, or through his agency in that city, or any other place where it might be advisable to go for the sale; and that he should be entitled to  $\frac{1}{3}$  of the net proceeds of sales, after deducting the 20 per cent. to apply on the amount advanced by him until it should be liquidated. *Hall* agreed to furnish a suitable repository for the sale, at his own cost and expense; and be responsible for all sales made by him. Wherever he might go for the sale, it should be at his own expense.

The plaintiffs below proved that the defendant had received provisions under this contract, from the plaintiffs, to the value of \$6762,30, and had returned to the value of \$1184,17, and paid the plaintiffs \$4194,22. This was between the 12th of *January, 1822*, and the 2d of *August, 1824*, and proof was also given of the delivery of other provisions; all in pursuance of the contract. On the last of *December, 1824*, *Kensett* went to *Hall's* store in *New-York*; and demanded all the provisions so delivered which were then unsold; and forbid *Hall* making any more sales; asked *Hall* to render his account; and offered that if he had any demand, or any storage, he (*K.*) would pay. *Hall*

*Daggett.*  
*D.* and *K.* agreed with *H.* that the former should carry on the business of preserving fresh provisions; and in consideration of the use of \$600 advanced by *H.* made him their only agent for selling the provisions in the city of *New-York*, for 10 years; agreed that he should be allowed 20 per cent. on all sales; and  $\frac{1}{3}$  of the net proceeds, after deducting the 20 per cent. to apply on the amount advanced, till it should be liquidated; *H.* to furnish a repository at his own cost, and be responsible for his sales.  
*Held*, that *D.* and *H.* had no right to demand the goods delivered to *H.* under this contract; he having an interest in, them, and a right to detain and sell them pursuant to the contract.  
*Held*, also, that the contract was not usurious.

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then produced the contract ; and asked *Kensett*, if he intended to comply with it ? This was repeated about the middle of *January*, when *Hall* offered to render his account ; but said he would consult his attorney first.

The plaintiffs resting on this proof, the defendant moved for a nonsuit, which was overruled ; and the judge charged that the plaintiffs had a right to demand the goods, on paying the defendant's lien, if any, whose duty it was to assert his lien, and render his account. If he had not done so, he had waived it. Whether it was asserted, and what the value of the remaining goods was, he left to the jury, who found for the plaintiffs \$500 damages ; on which judgment was rendered with costs. A bill of exceptions was taken to the opinion and charge of the court.

*J. Platt*, for the plaintiff in error, contended that the defendant below had a special property in the goods under the contract ; with the right of possession. He was entitled to retain for his advances. The contract being in full force, and the defendant in the act of performing it, there was no conversion. He cited 7 *T. R.* 387, 394, *per Lawrence, J.* ; 2 *Selv. N. P.* 1265 ; 7 *T. R.* 9 ; 2 *B. & P.* 438.

*S. P. Staples*, contra. If the defendant below had any lien, he should have put himself upon it. (1 *Campb.* 410, *n.* 1 *M. & S.* 147.) Not doing this, he waived it. But he had none. An offer was made to pay his demand ; but no account was rendered. It is a mistake to say he had any interest in the provisions. His interest was in the contract. But suppose he had an interest in the goods, it was merely as agent or factor ; and on payment or tender of his lien, he was bound to give up the goods. A factor, even on *del credere*, can do no less. An action on the case could have been only for not selling the provisions according to contract. If trover will not lie, we are remediless.

Beside, the contract was usurious and void.



*Curia*, per SAVAGE, Ch. J. The law is well settled, that the action of trover cannot be maintained, without the right of possession. The right of property alone is not enough. (7 T. R. 9.) This principle is not controverted; but it is contended that the plaintiffs below, having the right of property, became entitled also to the right of possession, by the demand of an account, and an offer to pay any lien which the defendant had: and further, that the defendant not having asserted any lien when the demand was made, such lien, if any existed, was waived. And it has been decided, that if one having a lien upon goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained against him, without evidence of any tender having been made of the amount of his lien. (1 Campb. 410. 1 M. & S. 148.)

The defendant in this case asserted no lien, except such as he was entitled to under his contract with the plaintiffs. The property in question had gone into his possession under that contract. If it was valid, and he had a right to retain the property and make sale of it, he was then entitled to 20 per cent. for commissions, and one third of the residue, to apply towards his advance of \$600.

The rights of the parties seem to me to be different from those of principal and factor generally. As between the latter, no doubt the principal may demand his goods, on tendering to the factor the amount of his lien for advances and expenses. As to commissions, there can be none, I apprehend, when there is no sale. But when parties choose to make a special contract, their rights must be determined by it. According to this contract, the defendant below advances money, as may be inferred, to purchase the raw material. The plaintiffs below are to manufacture it, and the defendant is to sell the manufactured article, and the 20 per cent. commissions pay him for the use of his money, for his trouble in making sales, and for guaranteeing those sales. If the plaintiffs below have it in their power to recover the property delivered to the defendant, they virtually abrogate their own agreement. They take

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away from the defendant the advantages resulting to him from the business; and trifle with their contract. The case of *Bromley v. Corwell*, (2 B. & P. 438,) is an authority to show that trover does not lie for goods delivered under a special contract, unless that contract is violated by the defendant. There the plaintiff sent some prints to the defendant in *India*, to be sold. They were not sold, because the price was too high. The plaintiff brought trover; but the court held that the conduct of the defendant, (who had left the prints with another person for sale,) did not amount to a conversion.

There is no pretence that the defendant below violated the contract. He was, therefore, lawfully in possession; and all the plaintiffs below had a right to ask of him, was the proceeds of sales, after deducting his commissions, and one third of the residue.

It is contended, however, on the part of the plaintiffs below, that the contract was usurious. There was a loan of \$600, it may be inferred; though from the phraseology of the contract, it might equally be inferred that there was a previous indebtedness to that amount. But I am willing to consider the advance of \$600, as made at the date of the contract. The parties were then about to begin a new business, the success of which was doubtful. The defendant was to incur a considerable expense on his part, preparatory to the sale of the goods in question; and it was by no means certain that the commissions would amount to 7 per cent. upon the money loaned, to say nothing of the interest of the money expended by him in furnishing a suitable repository, and of his personal services in making sale of the provisions. How can it be said that there was reserved an interest of any per centage at all? The defendant was to receive his principal from the proceeds of the sales. Suppose the articles had not found a ready market, but had remained on hand; could the defendant have recovered of the plaintiffs either principal or interest? The whole contract seems to me to show the commencement of a new adventure; a speculation in which these parties were separately interested; and each was liable

to loss, or, perhaps, might make large profits. If, indeed, the transaction was merely colorable, and intended to cover a loan reserving more than 7 *per cent.*, the form of the contract would not shield the lender. Thus, if the lender, besides interest, is to have a certain portion of the profits of a trade which exceeds legal interest, and is not liable to losses, it is usurious. (4 *T. R.* 353.) But if money is loaned, and the lender is to have part of the profits, and is subject to loss, it is not usurious. (2 *Burr.* 891.) The case under consideration, is not within these authorities. The lender here does not receive his interest, and profits beside; nor is his principal otherwise at risk, than as it may depend on the solvency of the borrowers, or their compliance with their contract. But it is also distinguishable in another important particular: the lender in this case renders personal services, and incurs other expenses in carrying on the business: and after all this, his compensation depends upon an untried experiment in this new branch of business.

It seems to me, then, that this contract is above all suspicion of usury; that the defendant was lawfully in possession of the goods in question, according to the terms of the contract; and was entitled to hold them, by the provisions of the contract, for sale; and that the plaintiffs had no claim for the goods themselves, but only for the proceeds, after deducting the defendant's commissions, and one third towards payment of the demand due to him. Of course trover would not lie. The judgment below must be reversed.

Judgment reversed.

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Hamilton
v.
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THE OVERSEERS OF THE POOR OF THE TOWN OF HAMIL-
TON against THE OVERSEERS OF THE POOR OF THE
TOWN OF EATON.

An indenture binding an infant pauper, executed by only one overseer of the poor of a town, though with the assent of two justices; and the binding be to another overseer, &c. of the same town, is defective; but is not void. It is voidable only; and if there be a complete service under it, the servant thereby gains a settlement.

ON certiorari to the general sessions of the peace of the county of *Madison*.

Two justices made an order to remove one *Elizabeth Watson* from the town of *Hamilton*, to the town of *Eaton*, in *Madison* county; and she was removed accordingly. On appeal by the overseers of *Eaton*, to the general sessions of *Madison*, that court quashed the order; whence the overseers of *Hamilton*, brought a certiorari to this court. The facts on which the decision of the sessions was founded, are stated in the opinion of this court.

I. Foote, for the plaintiffs in error, cited 1 *R. L.* 270, s. 2; *id.* 136, s. 4 and 5; *id.* 138; 5 *Cowen*, 367; 8 *T. R.* 379; 4 *T. R.* 769, 790; 3 *T. R.* 380; *Reeve's Dom. Rel.* 341, and the cases there cited; 1 *Bl. Com.* 452, 3; 1 *Salk.* 68.

P. Gridley, contra, cited 1 *R. L.* 279; 5 *Cowen*, 527; 13 *John.* 245; 5 *Cowen*, 363.

Curia, per *WOODWORTH, J.* The pauper was bound an apprentice to *Fuller*, one of the overseers of the poor of the town of *Hamilton*; and served the full term. *Maynard*, the other overseer of that town, executed the indenture. Two justices were present and approved. *Fuller* never executed it. It was left in the possession of *Maynard*, who testified that it was regular; but could not be found on search. The parol evidence was admissible but the binding was defective; the act, (1 *R. L.* 136 declaring that the overseers of the poor, with the consent of any two justices, may bind out any child who is chargeable.

The binding, however, was not absolutely void; voidable by the parties. It has had its effect betw



them. Neither party has chosen to take advantage of the defect; and it cannot be done by a third person. The town has had the benefit of the service, and cannot object. (*Burr. Set. Cas. No. 28, p. 91.*) The same principle is recognized in *Hudson v. Taghkanac*, (13 *John.* 245.) There the mother bound the child, her husband being alive; and it was held, that the town could not take advantage of the defect. (*Owasco v. Oswegatchie*, 5 *Cowen*, 527, *S. P.*)

The cases in which it has been held that a settlement could not be gained under an indenture not stamped, were decided on the words of the statute, 5 *W. & M. c.* 21, which says the indenture shall not be given in evidence, or available in any court. (*Burr. Set. Cas.* 199.) The order of the general sessions must be affirmed.

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v.
Liswell.

Order affirmed.

HOMAN against LISWELL.

ON error from the C. P. of the county of *Schenectady*.

A. C. Page, for the plaintiff in error, cited 2 *Cowen*, 518, 605 and 612, *note*; 1 *Serg. and Rawle*, 411, *per Tilghman*, *C. J.*; 1 *Com. on Cont.* 8, 9, 10, 58, 59; *Statute of 1824*, *sess.* 47, *ch.* 238, *s.* 17, *p.* 289.

M. T. Reynolds, *contra*.

The facts are stated in the opinion of the court, which was delivered by

An action will not lie against a constable for not serving an original execution, after it has been renewed by the plaintiff.

If it is renewed on the constable's responsibility, and on good consideration, the action, if

any will lie, should be assumpsit, not case for neglect in omitting to serve or return it.

An execution renewed, ceases to be an original.

If an execution be renewed on the constable's responsibility, before it has run out, such engagement of the constable, is *nudum pactum*, and void.

Where computation of time in a statute is to be from the date, or from an act done, the day of the date, or act, is exclusive.

Where an execution was dated the 7th of *March*, and returnable within 30 days from the date; held that it would not expire till after the 6th of *April*; and that the constable holding it, had the whole of that day, in which to execute and return it.

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SUTHERLAND, J. *Liswell* sued *Homan* before a justice, and declared against him in case, for not returning an execution, which had been delivered to *Homan*, as a constable, in favor of *Liswell* against *Dudley* and *Tremple*. *Liswell* recovered, before the justice, the amount of the execution. *Homan* appealed to the common pleas, where *Liswell* again recovers, and *Homan* brings his writ of error.

The execution bore date the 7th of *March*, 1825; and on the 6th of *April* following, it was renewed by direction, and with the assent of *Liswell's* agent, with a full knowledge of the time when it issued, and of all the circumstances of the case.

This was a perfect defence to the action. No action can be sustained for not returning an execution which the plaintiff himself has directed and permitted to be renewed. After it was renewed, no return could be made upon it, as an original execution; and after the plaintiff has assented to an act, which rendered a return impossible, he cannot have an action for not making such return. But it appeared that the agent of the plaintiff consented to the renewal, upon the express condition, that *Homan*, the constable, would be responsible. The language used, was, that *it was renewed upon his responsibility*, to which *Homan* assented. The action should have been assumpsit upon this promise, if it was valid. Clearly no other action could be maintained.

But we are also of opinion, that there was no legal consideration for the promise. The execution was returnable in thirty days from the date, pursuant to the act of 1824, (*sess.* 47, *chap.* 238, *s.* 14, *p.* 287, 8.) According to the principles of construction established by this court, as applicable both to statutes and notices, the constable had the whole of the 6th of *April* to serve and return the execution. In *Ex parte Dean*, (2 *Coven*, 605,) it was held, that where the computation of time in a statute, is to be *from an act done*, the first day should be excluded. That was on a statute prescribing the time within which an appeal should be brought from a justice's court. It was held that the day on which the judgment was rendered

should be excluded. The same principle was adopted in relation to the redemption act. (2 *Cowen*, 518.) If the execution, then, had not run out, and the constable had not become fixed, his promise was without consideration. It was a naked promise, by parol, to pay the debt of a third person. There is nothing in the case to show that the execution might not have been served. The judgment must be reversed.

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v.
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Judgment reversed.

THE PEOPLE against WHALEY.

THE defendant was indicted, at the general sessions of *Oneida*, county, for extortion as a justice of the peace.

The first count of the indictment stated, that *Butler* appeared before the defendant, a justice of *Oneida*, at the suit or *Grant*, on the return day of a summons, *February 7th*, 1826, at 10 A. M.; that the suit was discontinued by the non-appearance of the plaintiff. And that on the *7th of March*, the defendant, by color of his office, extorted from *Butler*, \$25, under pretence that the suit had been adjourned on the *7th of February*, to another day, when judgment was entered against *Butler*. The 2d count was more general. Without setting out the proceedings, it charged the defendant with extortion, by color of his office, under pretence that a judgment had been entered before him.

On a plea of not guilty, it was proved at the trial, that *Butler* appeared on the *7th of February*, between 11 and

Where a defendant appeared before a justice, on a summons returnable at 10 A. M.; and waited till about 12 o'clock, when the justice told him, he (the justice,) must tax the plaintiff with the costs, upon which the defendant departed; but the justice afterwards adjourned the cause to another day; and gave judgment as upon the summons, with 3 or 4

dollars costs; and the defendant afterwards paid to the justice the amount of the note on which the suit was brought; and the justice demanded the costs; which the defendant refused to pay in full; but paid the justice 12 1-2 cents; *held*, that this was extortion in the justice, for which he might be indicted and punished criminally.

Held also, that the motives of the justice, as whether corrupt, or whether he acted through a mistake of the law, were a proper question for the jury.

Held, that he had a right to receive the money on the note, as the agent of the plaintiff; but the extortion lay in receiving the 12 1-2 cents under pretence of the judgment.

Extortion is the taking of money by any officer by color of his office, either where none at all is due, or not so much due, or when it is not yet due.

When a cause is discontinued before a justice, by the laches of a plaintiff, the justice has no jurisdiction; and if he proceeds in it, his proceedings are *coram non judice*, and void.

Extortion may be laid generally, in an indictment, by color of office.

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12, A. M., on the summons as set forth in the indictment ; that the plaintiff did not appear. That, just before, or after 12 o'clock, the defendant told *Butler*, he must tax the plaintiff with the costs. But after *Butler* left the defendant, he adjourned the cause to the 10th of *February*. In the afternoon of the 7th, *Butler* again saw the justice ; conversed with him about the note on which the suit was instituted, and ascertained the balance, for which *Butler* offered to confess judgment. But the defendant said nothing to him about any adjournment. On the 10th, the defendant entered judgment against *Butler*, not only for the note, but 3 or 4 dollars costs of previous summonses, fees of constable and witnesses. *Butler* afterwards paid the defendant the amount of the note, and 12 1-2 cents ; the defendant at the same time demanding the 3 or 4 dollars costs.

The court charged the jury, that if they believed that *Grant* was non-suited by the justice, or that the cause was discontinued before him, the subsequent proceedings were *coram non judice*, and void for want of jurisdiction ; and the receipt of any money from *Butler*, as fees upon a judgment, would be extortion, if they believed the defendant acted through corrupt motives. That if such were his motives, the judgment would not protect him. That it was for the jury to determine whether these facts were so, or not. But that if they believed the defendant acted without corrupt or dishonest motives, supposing that he had a right to proceed as he had done, it would be their duty to acquit him. That if his error was one of judgment merely, they should acquit.

The counsel for the defendant, considering the charge incorrect, suggested this, and the sessions made a case for the opinion of this court, which was attached to the indictment.

S. Beardsley, for the defendant, (*G. C. Bronson*, same side,) now insisted that the judgment before the defendant was valid, either by the confession of *Butler*, or as rendered on the trial of a cause regularly adjourned. At

most, it was merely erroneous. (8 *John*. 391. 11 *id.* 407. 12 *id.* 217.) The court erred in leaving it to the jury, to say whether there was a non-suit, or discontinuance. No non-suit is charged in the first count of the indictment; and no evidence was given, which, in its nature, would prove a non-suit. The jury were bound, therefore, not to regard it. (5 *Coven*, 246.) A judgment could be rendered, only by entering it in writing. (*Burr. Set. Cas.* 322.) The mere declaration of the justice, that he would tax the plaintiff with the costs, was not a judgment. The question whether the cause was discontinued by the lapse of time, and absence of the plaintiff, should have been left to the jury.

The indictment is defective, in omitting to charge, that the money paid by *Butler* was not due in fact. (4 *Bl. Com.* 141. 2 *Ch. Cr. L.* 295, note (p). *Co. Lit.* 368, b. 1 *Hawk. P. C.* 316.) Beside, it is not extortion, unless received by the defendant, as *fees* for his own use. The payment was voluntary, and was due to *Grant*, excepting the 12 1-2 cents, which were due to the justice, for entering the judgment.

H. Denio, (*Dist. Attorney*), and *Talcott*, (*Attorney General*), contra, cited 9 *John*. 140; 1 *Hawk. P. C.* 316; 14 *Vm. Abr.* 363, pl. 8; 7 *East*, 218.

Curia, per *SAVAGE*, Ch. J. An objection is taken to the indictment, that the defendant is not charged with taking the money, as *fees*, or to his own use. It was not necessary to lay the offence in that manner; it is sufficient that he extorted it by color of his office. Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by any officer, by color of his office; either, where none at all is due, or not so much due, or when it is not yet due. (1 *Hawk. B.* 68, s. 1.) And the cases cited by the defendant's counsel, do not show any necessity for the averment insisted on.

The other questions relate to the correctness of the charge. I think it sound. The word *non-suit*, was prob-

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ably used as synonymous with *discontinuance*; and though, perhaps, not technically correct, it could not mislead the jury. If the cause had become discontinued by the laches of the plaintiff, then the justice had no jurisdiction; and as well the adjournment as the subsequent proceedings, were void. If void, then the defendant received from *Butler*, one shilling, by color of his office, which was not due. The amount of the note was due; and, as the agent of *Grant*, the *payee*, the defendant had a right to receive it. The justice was authorized to enter a judgment on the note, by confession; and we might presume it to have been so entered, were it not positively proved that it was entered as upon trial, and not upon confession.

The questions of fact and intent, were fairly submitted to the jury. It was their province to judge of both, and of the credibility of the witnesses. The jury have found, by the verdict, that the cause before the defendant, had become discontinued before he entered the adjournment; and that he received and demanded the money by color of his office, and with the corrupt intent charged in the indictment. These facts being proved, the offence was complete. We are not now to enquire whether the verdict is such as we might have found. We are not here to decide the fact, but the law. There was no error in the charge; and I am of opinion, that the proceedings of the court below are not questionable in any view.

ALBANY,
Feb. 1827.MILLER *against* PLUMB.Miller
v.
Plumb.

ON error from the C. P. of *Monroe* county.

Plumb brought trover in the court below against *Miller*, for certain materials appertaining to a building for manufacturing ashes, viz : 2 potash kettles, 2 five-pail kettles, 2 troughs, 5 leaches, and 500 feet of boards. It appeared, at the trial, that while *Plumb* owned the ashery, the materials in question belonged to it. The two potash kettles were set in an arch of mason work with a chimney. The arches were set upon a platform ; but not fastened to the building. The troughs were sunk in the ground, so that the upper part was nearly even with the top. The boards were for an upper floor in the building. Two small kettles were not set in any way ; but stood in the building, and were necessary for use. In this state of things, the plaintiff below, on the 3d of *March*, 1824, articulated to convey the premises on which the ashery stood, to the defendant below, on the 15th of *April* following, if the consideration money was paid ; by which day it was paid, and the defendant took possession. On the 11th of *February* 1825, *Plumb* conveyed the premises to *Miller*, by deed of common warranty, without any reservation. *Miller* then demised the ashery ; the lessee took possession, and used the kettles until the building was burnt down ; and afterwards paid for the use.

The court below charged that the plaintiff, *Plumb*, was entitled to recover ; and a verdict and judgment was rendered for him accordingly. The defendant below excepted to the charge.

Immediately after issue on the record, which was of *June* term, 1825, the cause was continued thus : " And hereupon the proceedings thereof are continued, &c. until the 1st *Monday* of *October* next, (the next term.) Therefore,

As between vendor and vendee of land, all fixtures pass to the latter, though they were erected by the vendor for the purposes of trade or manufactures.

The rule is the same as between heir and executor.

But it is otherwise as between tenant and landlord or reversioner, and as between tenant for life and remainder-man.

In the C. P. a record, immediately after the issue, (of *June* term, 1825,) continued the cause by a general continuance to *October* term (then) next : and then said, " therefore, let there come a jury, &c. at *December* term next ;" and then said, " at which day, &c. come the parties, &c. and the jurors, &c. also come, who, to speak the truth, &c."

Held, that this referred the appearance of the parties, and jury, and the rendition of the verdict, to *December* term ; and that there was no error, therefore, in the record. But that, at most, it was a mere miscontinuance, which was cured by the statute of amendments and jeofails.

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let there come a jury thereof, &c. on the 1st *Monday of December next*, &c., (*the next term*,) at which day, &c. come the parties, &c. and the jurors, &c. also come, who, to speak the truth, &c." (*setting forth the verdict*.)

J. Boughton, for the plaintiff in error, contended that the fixtures passed by the conveyance; and cited *Bull. N. P.* 34; 2 *Bl. Com.* 428; *Toll. L. Ex.* 197, 198, and cases there cited; 3 *East*, 51; 3 *Atk.* 13; 20 *John.* 32; 7 *Mass. Rep.* 432; 13 *John.* 404, 406.

R. Beach, contra, insisted that there was no formal error in the record; but if otherwise, the defect was cured by the statute of amendments and jeofails. (3 *John.* 183. 7 *id.* 467. 5 *id.* 89. 1 *Cowen*, 189.)

That the fixtures did not pass, he cited 6 *John.* 5; 3 *Atk.* 13.

Curia, per WOODWORTH, J. The first objection is to the form of the record.

A continuance is entered from *June* to *October* term; and then an award of venire to *December* term, then next; at which day came the parties; and the jurors also came. This is sufficiently plain, and must be understood, that the parties and jurors appeared at *December* term. Although, under the statute, the continuance might have been awarded from *June* to *December*, without any award of venire, the present entry is substantially the same; and, at most, is only a miscontinuance, which is cured by the statute of jeofails. (3 *John.* 183.)

The more important question is, whether the potash kettles, being affixed to the freehold, passed with the land. If they did, the court below erred; and the judgment must be reversed, unless the case falls within some of the qualifications or exceptions to the general rule. That rule appears to be well established; whatever affixed to the freehold becomes part of it, and cannot be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail; the reversioner; yet the rule still holds between heir

executor. (*Bul. N. P.* 34.) In *Holmes v. Tremper*, (20 *John.* 30,) chief justice *Spencer* says, "when a farm is sold without any reservation, the same rule would apply, as to the right of the vendor to remove fixtures, as exists between the heir and executor."

Lord *Ellenborough*, in the case of *Elwes v. Maw*, (3 *East*, 38,) lays down the law relative to fixtures as arising between three classes of persons: 1. Between heir and executor: 2. Between the executors of tenant for life or in tail and the remainderman, or reversioner: 3. Between landlord and tenant; and observes that, "in the first case, the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, any thing which has been affixed thereto." In the latter cases, the reasons for relaxing the rule are obvious, upon motives of public policy. The tenant is thereby encouraged to make improvements, and the interest of trade promoted, while the landlord or reversioner has no cause to complain, inasmuch as the farm is restored to him in the same state as when he parted with it. A different rule would effectually check all improvements by the tenant, where it is known that, at the end of the term, they are to be surrendered to the landlord, or the reversioner of tenant for life. But the case between heir and executor, and vendor and vendee, is widely different. The ancestor or vendor has the absolute control not only of the land, but of the improvements. The heir and executor are both representatives of the ancestor; the vendor has an election to sell or not to sell the inheritance.

If he does elect to sell, he knows that, by law, the fixtures pass; and there is no good reason why that law should interpose in his behalf, and protect him against the loss of improvements which he has deliberately chosen to part with. It is for reasons of his kind, I apprehend, the old rule of law seems still to hold. In 7 *Bac.* 258, this is expressly recognized. The author observes, that although in an action of trover by an executor against an heir, for a cider mill, tried at *Worcester*, before Lord C. B. *Comyns*, his

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lordship was of opinion that it was personal estate, and directed the jury to find for the executor; yet Lord *Mansfield* has observed, that that case, in all probability, turned upon a custom; and that where no circumstances of that kind arise, the rule still holds in favor of the heir, seems fully established by the decision of the court of king's bench, in *Lawton v. Lawton*, (*Easter, 22 Geo. 3.*) The title of the case referred to, seems to be *Lawton v. Salmon*, and is to be found in 1 *H. Bl.* 259, note (a). As reported, I do not find that Lord *Mansfield*, in giving this opinion of the court, says that the case before *Comyns*, C. B. turned upon a custom. Yet the whole scope of the opinion is clearly against it. He recognizes the relaxation of the old rule as confined to cases between landlord and tenant, and tenant for life and remainderman; where, for the benefit of trade, and as an encouragement to lay out money in improving the estate, there has been a departure from the old rule, which is no injury to the remainderman, because he takes the estate in the same condition, as if the thing in question had never been raised. He adds, "I cannot find that between heir and executor, there has been any relaxation of this sort, except in the case of the cider mill, which is not printed at large." It was a *nisi prius* decision, and evidently considered as not controlling the general law.

From this review, it appears to me that the case of vendor and vendee rests on the same ground as that of heir and executor; and that the fixtures in such cases are not considered as personal property. I incline to think the evidence of conversion was sufficient; and that the plaintiff was entitled to recover for some articles not annexed to the freehold; but as damages were recovered for the whole, which cannot now be severed, the judgment in the court below must be reversed, and a *venire de novo* awarded by the common pleas of *Monroe*.

Judgment reversed.

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M'FARLAND against SMITH.

M'Farland
v.
Smith.

ASSUMPSIT, tried at the *Washington* circuit, *December 14th*, 1825, before WALWORTH, C. Judge.

The action was founded on the following letter written by the defendant: "*April 15th*, 1824. *John Crary, Esq.* Dear Sir, I have told *Richard* that if he can make an arrangement with his creditors here, that I will be responsible for the payment of the same in one year from this date; and as I have not time to make the arrangement now, you may give them that assurance if referred to." (Signed) *Esra Smith*. It appeared at the trial, that the defendant had written this letter, which was delivered to Mr. *Crary*; that *Richard*, named in the letter, was *Richard W. Smith*, a brother of the defendant. *Richard* owed the plaintiff on a note of \$91,17, then due. A few days after the letter was received by Mr. *Crary*, he showed it to the plaintiff, on his inquiring whether the defendant had given any assurance that *Richard's* debts should be paid. Other creditors of *Richard*, also called on Mr. *Crary*; and some of them left their demands with him. The plaintiff, when he called, asked Mr. *Crary*, if the letter would legally bind the defendant to pay *Richard's* debts; and Mr. *C.* answered that it would. In *June*, 1825, the attorney for the plaintiff gave the defendant notice of the debt due on the note, and demanded payment, which the defendant refused.

On these facts, the plaintiff rested. The defendant moved for a nonsuit, which was overruled.

The defendant then proved the existence of other demands against *Richard*, at *Salem*, where the letter was written, on which no agreements had been made to delay payment.

The objections taken to the plaintiff's recovery were, (among others,) that the defendant's letter was intended

arrangement with a single creditor, yet *M.* must prove a binding agreement not to sue upon the original debt within the year; and that there was nothing in the fact that he knew of the letter, and actually waited a year, which would authorize a jury to infer such an arrangement.

S. wrote a letter in *Salem*, addressed to *C. of Salem*, stating that he, (*S.*) had told *R.*, his brother, that if he (*R.*) could make an arrangement with his creditors there, (*Salem*,) he would be responsible for payment in one year.

M. was one of the creditors, and on the letter being shown to him, he waited one year, and then demanded his debt of *S.*; and brought an action on the promise contained in the letter. *R.* had other creditors at *Salem*, with whom no arrangements had been made. *Held*, that the promise in the letter was upon the condition that an arrangement should be made with all the creditors at *Salem*; and the action would not therefore lie.

Held, also, that if it referred to an ar-

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of an arrangement with *Richard's* creditors generally; and that if an arrangement with any particular creditor was intended, yet that none had been shown with the plaintiff.

The judge overruled the first objection; and left it to the jury to say, whether the plaintiff had agreed to delay the collection of his debt, on the faith of the letter, for one year. The defendant excepted to the decision and charge. The jury found for the plaintiff.

Other particulars will be found stated in the opinion of the court.

On the bill of exceptions,

S. Stevens, for the defendant, now moved for a new trial.

J. Willard, contra.

Curia, per SUTHERLAND, J. I think the judge erred in the construction of the letter, or agreement of the defendant, which is the foundation of this action. He charged the jury, that the true construction of that agreement was, if any one of the creditors of *Richard W. Smith* would agree to wait, and, in pursuance thereof, did wait for the payment of his debt, one year, he, the defendant, promised to pay the debt. Now it appears to me, from the terms of the letter, that the defendant contemplated an arrangement with the creditors of his brother at *Salem*, generally. He uses the plural noun, without adding the qualifying terms, or any of them; and the very nature and object of the undertaking seem to imply an expectation and understanding on the part of the defendant, that the creditors generally should assent to it. The motive of the defendant must have been, either to prevent his brother's property, (if he had any,) from being sacrificed by his creditors, or to save him from arrest or imprisonment. Neither of these objects would be accomplished by the assent of a single creditor to the proposition. It appears from the testimony of *Mr. Crary*, that *Richard W. Smith*, the brother of the defendant, had just been admitted an attorney of this court; that the defendant had purchased a

library for him, and was desirous of having him remove from *Salem* to *Whitehall*, for the purpose of establishing himself in business at that place. And it is to be inferred from the evidence, that the defendant apprehended that the creditors of his brother would not permit him to leave *Salem*, unless they had some security for their demands: or if they did, that he could not prosecute his profession, with any prospect of success, with these debts impending over him.

The intention of the defendant, therefore, as derived from the terms of his letter, is strongly corroborated by all the circumstances in the case. Admitting the letter to contain a binding promise on the part of the defendant to pay the debts of his brother, in one year, it is upon the condition that his brother can make an arrangement with all his creditors at *Salem* for a year's indulgence.

Having instructed the jury as to the legal import of the contract, he further charged them, "that if they were satisfied from the testimony, that the plaintiff had agreed to wait and delay payment of his debt, so that he had no right to sue *Richard* for his debt for one year, then they must find for the plaintiff."

If the judge was right in the construction which he put upon the contract, then the legal proposition embraced in the succeeding part of the charge was undoubtedly correct, as an abstract proposition. But the objection to it is, that there is not a particle of evidence in the case, that the plaintiff ever did make any agreement with the defendant or his brother *Richard*, or any one in their behalf, to suspend the collection of his debt against *Richard* for a single hour. All the evidence on this point is contained in the testimony of Mr. *Crary*. He states that the plaintiff called on him, and asked him if the defendant had given any assurance that *R. W. Smith's* debts would be paid. That the witness then showed the letter as containing the assurance which had been given by him. That the plaintiff showed the witness a note against *R. W. Smith*. That no other agreement whatever was made between witness and the plaintiff, that the plaintiff should wait on *R. W. Smith* for his

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*pay, than what might be inferred from the transaction stated.* The plaintiff asked the witness if the letter would legally bind the defendant to pay the debts of *R. W. Smith*; and the witness answered in the affirmative. He requested the witness to keep the letter, and appeared to be satisfied.

There is nothing in this, that amounts to an agreement of any sort. The plaintiff might, the next day, have put his demand in suit, without the violation of any legal or moral obligation on his part. The charge of the judge was calculated to mislead the jury. They had a right to infer from it, that in the opinion of the judge, the evidence in the case warranted the conclusion that the plaintiff had made such an agreement, or that the fact of abstaining from suing, was equivalent to an agreement not to sue.

It was clearly proved that there were other creditors of *Richard* besides the plaintiff, by some of whom he was sued. On these grounds, we are of opinion that the verdict ought to be set aside, and a new trial granted.

We have not thought it necessary to express any opinion upon the other points raised in the case, because, according to our construction of the defendant's letter, it was, at most, a promise to pay the debts of *Richard* upon a certain condition, which the case shows conclusively never was complied with on the part of his creditors. Whether the defendant would have been bound to pay, if that condition had been complied with, it is of no importance to determine.

New trial granted.

ALBANY,  
Feb. 1837.FOWLER AND OTHERS *against* THE ÆTNA FIRE INSURANCE COMPANY of the city of *New-York*.Fowler  
v.  
Ætna Fire  
Ins. Co.

ASSUMPSIT, on a policy of insurance against fire ; tried at the *New-York* circuit, *July 6th*, 1826, before EDWARDS, C. Judge.

The plaintiffs, at the trial, proved a policy executed by the defendants, on the stock in trade of the plaintiffs, consisting of, &c. contained in a two story frame house, *filled in with brick*, situate at No. 152, *Chatham* street, in the city of *New-York*. It appeared that the house No. 152, *Chatham* street, was burned, with the plaintiffs' stock in trade ; but that the house was a wooden building, *with hollow walls, and not filled in with brick*. That one of the conditions attached to the policy was, that if any person insuring any building or goods at the *Ætna* office, should describe the same otherwise than as they really were ; so that the same might be insured at less than the rate of premium specified in the printed proposals of the company, such insurance should be void and of no effect. Evidence was given at the trial, on the question whether the plaintiffs had been guilty of fraud in procuring an over valuation of the goods destroyed ; and among other evidence, the judge allowed proof on the part of the plaintiffs, of their good character for integrity. This was objected to, and made one point of exception by the defendants.

The defendants insisted that the description of the goods, as being in a house *filled in with brick*, was a warranty which must be strictly complied with. The judge so considered it ; but he received evidence to show that the wrong description was either a mistake of the plaintiffs, or of the agent of the defendants ; and charged the jury, that if the plaintiffs made no representation of the character of

kind described the subject insured, as the stock in trade of the insured, contained in a two story frame house *filled in with brick*, No. 152, *Chatham* street ; the house No. 152 being a frame house *not filled in with brick* ; held, that the policy was void.

In general, where a party is charged with a specific fraud in a civil action, his character is not in issue. The evidence of fraud cannot be repelled, therefore, by proving his general good character for integrity.

The case of *Ryan v. Perry*, (3 *Caines*, 120,) was an exception to this rule, being a charge of gross depravity and fraud upon circumstances merely.

The description of the property insured in a policy against loss by fire, is a warranty that the property is as described ; and if untrue in substance, the policy is void, though the misdescription arise from mistake ; and there be no fraud.

Thus, where a policy of this

clearly, upon that foundation, this mere representation can not be considered a warranty. Marine policies are a peculiar class of contracts; and their meaning was settled by judicial decisions. (1 *Burr.* 347.) These policies are generally effected on the representation of the assured; (3 *Burr.* 1909;) and many times the subject is at too great distance to undergo the examination of the under-writer. If the clause in question is to be tested by ordinary rules, it is clearly no warranty. (1 *John.* 96. 4 *id.* 421. 20 *id.* 196.) The proposals show the meaning of the parties. They are, substantially, that misdescription shall not vitiate, unless it be fraudulent. Whether the description was intended as a warranty, was a question of intention, as in other cases of representation.

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*Curia, per SAVAGE, Ch. J.* As to the evidence of character, it was said by this court, in *Ruan v. Perry*, (3 *Caines*, 120,) "that in actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, evidence of uniform integrity and good character, is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." The rule in *England* is this: "that in a direct prosecution for a crime, such evidence is admissible; but when the prosecution is not directly for the crime, but for the penalty, it is not." (*Attorney General v. Bowman*, 2 *B. & P.* 532, note (a).) That was an information against the defendant for keeping false weights, and for attempting to corrupt an officer. *Eyre, Ch. Baron*, said, "I cannot admit this evidence in a civil suit." If such evidence is admissible here, it will be proper in every case where unfair practices are alleged. A specific fraud is charged, that must be met upon its own merits; unless supported only by circumstances; as in the case of *Ruan v. Perry*, where a naval officer was charged with gross fraud and collusion with a foreign officer, upon slight circumstances. If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every

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man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties.

I think it very immaterial as regards this action, whether the error in description arose from design or mistake. The question is, did this description amount to a warranty that the property answered the description? The judge at the circuit so considered it; and it was admitted on the argument, that if the principles of marine insurance are applicable to fire insurance, it is a warranty. In the case of *Stetson v. Mass. Mutual Fire Ins. Co.*, (4 *Mass. Rep.* 337,) *Sewall*, justice, lays down the law thus: "The estimate of the risk undertaken by an insurer must generally depend upon the description of it made by the insured or his agent. A mistake or omission in his representation of the risk, whether willful or accidental, if material to the risk insured, avoids the contract." For this, he cites 1 *Marsh. on Ins.* 335, 339. That writer states that a warranty being in the nature of a condition precedent, must be fulfilled by the insured, before performance can be enforced against the insurer; and whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misinformation, or any other cause, the consequence is the same. (1 *Marsh.* 347.)

In relation to the sale of personal property, it is held that a bill of parcels is not a warranty that the goods are what they are represented to be. (2 *Caines*, 48, and other cases down to the 20 *John.* 198.) But in relation to policies of insurance, it is held that a description of a vessel, is a warranty. For instance, the description of a vessel as *Swedish*, is a warranty of her national character. (*Phil. on Ins.* 125, and the cases there cited. 8 *John.* 237, 319.) Several cases in 2 *H. Bl.* 574, &c. show that the conditions attached to the policy are to be considered parcel of the instrument.

No cases have been produced, to show that a description of property insured by a policy against fire, is to be

construed differently from a description in a marine policy. I can perceive no reason why there should be a difference. "Insurance," says lord *Mansfield*, "is a contract upon speculation." (3 *Burr*. 1909.) "The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation," &c. He says the insured need not state what the insurer knows; but the keeping back the true state of the property, is a fraud.

In this case, the plaintiffs ought to have known the true state and condition of their house, and have truly represented it. Not having done so, they fail in their action. The property burned is not the property insured.

This is not a case in which equities should be considered. It is a sort of gambling, a speculating upon chances; and the parties must be held strictly and literally to their contract.

I think the judge misdirected the jury, and that a new trial should be granted.

New trial granted.

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Jackson  
v.  
Vermilyea.

JACKSON, *ex. dem.* Hasbrouck, against VERMILYEA.

EJECTMENT for 25 acres of land, including a grist mill in *Middletown, Delaware county*; tried at the circuit in that

A lease of a small tract of land, *s. g.* 63 acres, and act-

ual possession by the lessee, of a part, with a claim of title to the whole, constitutes an adverse possession of the whole.

And while it is so possessed, a conveyance, by any one except the adverse possessor, to another, of a part of the land so possessed, though it also include an adjoining parcel not so possessed, and the grantee enter upon the latter parcel, claiming to the whole extent of his conveyance, will not constitute the grantee, a constructive, or actual possessor, beyond the parcel on which he enters.

If one have constructive possession by color of title, and occupying a part; another cannot acquire a constructive possession to the same extent, in the same manner; but though the latter enter on part, with color of title to the whole, and claim the whole, his possession will be confined in extent, to the part which he actually occupies.

An exception of a millsite, in a grant or lease, operates as an exception of the soil of the mill site; and so much land as is necessary for the mill pond, and for erecting and carrying on the business of a mill.

It is not the reservation of a mere easement; but of the soil itself; and the grantor or lessor, or his assigns, may enter upon and locate under the exception, even after the grantee, or lessee, has conveyed, or assigned, or mortgaged his interest to another.

## CASES IN THE SUPREME COURT

r, county, *September 1st*, 1823, before NELSON, C. Judge;  
27. when a verdict was taken for the plaintiff, subject to the  
on opinion of this court, on a case.

lyea. *Ruggles and Hasbrouck*, for the plaintiff, cited 16 *John*.  
184; 4 *id.* 81; 10 *John.* 435.

*Sherwood and Parker*, contra, cited 2 *Cowen*, 283;  
*Runn. on Ej.* 113; 1 *Wils.* 220; *Bull. N. P.* 110.

The facts are stated in the opinion of the court, which  
was delivered by

WOODWORTH, J. The plaintiff claimed title as the as-  
signee of a mortgage, executed by *Noah Ellis* to *Phillip*  
*Sickler*, dated *October 5th*, 1811.

The premises described, contained 25 acres; and in-  
cluded part of a grist mill in possession of the defendant.  
It appeared that *Ellis* was in possession of the premises at  
the date of the mortgage, by virtue of a lease from *Gen.*  
*Armstrong* to him, and continued in possession for several  
years thereafter, when he surrendered to the mortgagee.

The defendant disclaimed having possession of any part  
of the 25 acres, excepting the mill and mill site. He read  
in evidence, a lease from *Armstrong* to *Andrew Sickler*,  
dated *October 10th*, 1818, for the mill and mill site, and 25  
acres of land, being the premises in question; which lease  
was assigned to the defendant. A lease from *Armstrong*  
to *Ellis*, dated *May 1st*, 1802, was given in evidence by  
the plaintiff. It was admitted to have lately come from the  
hands of *Armstrong*. The signatures were erased, and the  
seals torn off. A corner of the lease with part of the de-  
scription of the premises were also torn off.

By the case, the lease was to be produced on the argu-  
ment; it has not been delivered to me. I am, therefore,  
unable to say, whether it contained any reservation of part  
of the premises. This fact is then to be ascertained by the  
testimony of *Ellis*, which was not objected to. He says  
the lease was in his possession, when the mortgage was  
given; that the corner was torn off accidentally; that the  
seals remained on as long as he held it. The description

of the premises included a part of the mill. *Ellis* also testified, that he did not know that the defendant had ever been in the actual occupation of any part of the premises, excepting the mill and pond. He could not say from recollection, but he believed the lease contained an exception of mill sites, from the circumstance of his obtaining permission from *Armstrong* to build the mill; and from knowing that mill sites were excepted in all his leases. The witness never claimed the mill site under his lease. On this state of facts, I think we are to consider, that, in the lease to *Ellis*, the mill site was excepted. I presume by inspection of the lease, it cannot be determined whether excepted or not. This, however, is not expressly stated. I apprehend that neither party would be disposed to rest on parol testimony, as to the contents, unless the lease had been defaced, or a part of it destroyed.

On this statement, the plaintiff made out a title to recover the 25 acres, excepting so much as was comprehended within the mill site reserved; provided the defendant was in possession of the land not included in the mill site. He admitted he had possession of a part, (the mill and mill site,) not exceeding two acres. The plaintiff offered no testimony as to the extent of the defendant's actual occupancy; but contends that, as *Armstrong* conveyed to the person under whom the defendant derives title, the whole 25 acres, the defendant is to be considered as the possessor to that extent.

It appears that the premises are wood-land. There are no improvements. The right of *Ellis* passed to the plaintiff by virtue of the mortgage. The land has never been actually occupied; but it will be recollected that the lease to *Ellis* contained 63 acres, of which the 25 acres mortgaged, were parcel; that *Ellis* actually occupied a part of the 63 acres, and claimed title to the whole; so that, although the 25 acres were unimproved, he had a good adverse possession to the whole, on the ground of occupancy of a part, and a lease including the 63 acres. The conveyance obtained from *Armstrong* in 1818, although it includes the 25 acres, conferred no title to any thing but

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there is no specific description of the quantity of land reserved, it must be intended to include so much as might reasonably be required for the purpose of erecting and carrying on the business of a mill. The defendant has located and entered upon a small parcel for that purpose; which the facts in the case do not enable me to say was unreasonable or too extensive. It is contended that the reservation was merely an easement or privilege; but this is evidently a mistake. A mill site is reserved, which is a reservation of so much land as may be necessary for the purpose of erecting and working a mill. The plaintiff has not shown how much land the defendant actually occupies as a mill-site. The defendant admits the quantity of two acres. Under his grant, he must be considered as having located this parcel, as appurtenant and necessary to the mill. There is nothing in the case to show that this was too extensive. It is not material, whether the location was made before or after the execution of the mortgage; for if the mill-site was reserved, no right to it was acquired by the mortgage; and the defendant might actually enter on, and locate the premises, as well after as before.

I am, therefore, of opinion that, as to the mill-site on which the mill was erected, the defendant has shown title; and as to the 25 acres of woodland, the defendant was not, in judgment of law, the possessor. Consequently the defendant is entitled to judgment.

Judgment for the defendant.

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Where the testimony before a jury is contradictory, and the character and credit of witnesses are in question, a new trial will not be granted on the ground that the verdict is against the weight of evidence.

Where a witness is introduced by a party, and is interrogated as to a particular fact, and the opposite party, on cross-examination, asks him generally, if he ever communicated that fact to any one, and to whom? and he answers that he communicated it to the party calling him; this does not entitle the party calling him to pursue the inquiry as to his own reply, and other conversation with the witness at the time of the communication.

Otherwise, if the witness be asked, on cross-examination, specifically, whether he made the communication to the party calling him.

It seems, that a note given by a deviser, in his life time, to secure a devisee in a will, against the alteration or revocation of the will, is without consideration, and void.

Where the maker, the defendant, sought to impeach a note, by showing the want of a valuable consideration; and the plaintiff answered by proving a pecuniary consideration; and the defendant replied by evidence of the plaintiff's declarations, that the consideration was not pecuniary, but the note was given upon a special agreement between the parties; held, that it should not be left to the jury, to say whether the note was not sustained by the consideration stated in the plaintiff's declarations, as proved by the defendant.

A plaintiff cannot go to a jury upon two distinct and inconsistent propositions proved by himself, or established by his own proof, in connexion with his declarations as proved by the defendant.

WINCHELL against LATHAM, executor of Porter.

ASSUMPSIT, tried at the *Oncida* circuit, April, 1826, before WILLIAMS, C. Judge.

The action was on three promissory notes, dated respectively *January 21st*, *April 21st*, and *November 13th*, 1823, the last for \$2100,20, made by the testator and payable to the plaintiff.

After the plaintiff had proved the handwriting of the testator to the several notes, the parties went into evidence touching the consideration of the large one, which, with the points arising upon it, and the other matters material to the questions decided, will be found stated in the opinion of the court.

The jury found for the plaintiff, with \$2468,44 damages.

A motion was now made, in behalf of the defendant, for a new trial.

*W. H. Maynard*, and *T. J. Oakley*, for the motion, cited 1 *John*. 139; 3 *id.* 506; 7 *id.* 341; 4 *id.* 235; 3 *id.* 199; 13 *id.* 379; 4 *Dall.* 111, 130.

*S. Beardsley* and *G. C. Bronson*, contra.

*Curia*, per SUTHERLAND, J. The only matter in controversy between the parties, is the note of *November 13th*, 1823, for \$2100,20, which purports to have been signed by *Oliver Porter*, the testator of the defendant. There seems to be no doubt of the genuineness of the signature. But it is contended by the defendant, either that

it was obtained from *Porter* by imposition, when he was in a state of intoxication, or that he supposed it to be a small note, probably for twenty-one dollars and twenty cents; and that the word *hundred* was fraudulently inserted by the plaintiff, either before or after it was signed; or if signed with a knowledge of its contents, that it was given without any legal consideration. The body of the note is in the handwriting of the plaintiff.

The real nature of this transaction is involved in great doubt and mystery: and I have seldom had occasion to examine a case, in which I found it so difficult to arrive at a satisfactory conclusion. The witnesses were very numerous, and their testimony extremely contradictory; and the verdict of the jury must have been very essentially influenced by the general character and appearance of the witnesses, and their manner of testifying. Some of them were directly impeached; others were shown to have given various and contradictory accounts of the same transaction; others stood in different degrees of relationship, or connexion with the parties; and may have been supposed, by the jury, to have testified under the influence of strong prepossessions.

In truth, the case is characterized by all the circumstances which render it peculiarly proper for the determination of a jury; and, without intending to express any opinion as to the weight or preponderance of evidence, we have no hesitation in saying, that the verdict is not so clearly and unquestionably against it, as to justify us in setting it aside on that ground.

The motion for a new trial must, therefore, be denied, unless the judge erred in the admission or rejection of evidence; or in his charge to the jury.

It does not appear, from the case, that any exception was taken upon the trial, to any decision of the judge, or to any opinion expressed by him in his charge to the jury. We should be justified, therefore, in refusing to entertain any question in relation to either. But it is not within the recollection of the court, that this objection was taken upon the argument. In a case of so much importance,

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therefore, we will presume that exceptions were in fact taken; and that the formal statement of them was unintentionally omitted in drawing the case.

The first exception relates to the testimony of *Simon Hyde*. He was a witness for the defendant; and, in his direct examination, stated, that in *November* or *December*, 1823, *Winchell* showed him a note, upon the back of which was written *Oliver Porter's note, for \$2100 and some cents*, which he believes to be the note in question. *Winchell* was then on his way to *Connecticut*, and the witness asked him how he came by such a note against *Porter*? *Winchell* replied that he had some money, which he did not wish to carry with him to *Connecticut*; and he had left it with *Porter*, because he knew it would be safe, and that he would not use it.

Upon his cross examination, he was asked by the plaintiff's counsel, if he had ever told any body that he had seen such a note, or that the plaintiff had such a note? and if he had, when and whom? The witness answered, that the first person to whom he mentioned it, was *Porter, the testator*; that it was after *Winchell's* return from *Connecticut*; but how long he could not tell. The counsel for the defendant then asked the witness what *Porter* said about the large note when he gave him the information? This question was objected to by the plaintiff's counsel, on the ground that the defendant could not give in evidence, the declarations of *Porter* in his own favor; and the objection was sustained, and the question excluded by the judge. The decision of the judge was undoubtedly correct. The witness was not asked whether he had ever informed *Porter* that he had seen the note? But the question was general, if he had informed *any body, and whom*? He was *the defendant's* witness; and it is not to be supposed that the plaintiff knew what his answer would be. The question was not, therefore, put with the view or expectation of bringing home to *Porter* knowledge of the existence of the note; but for the purpose, probably, of testing the accuracy of the witness, by compelling him to name the individuals to whom he had communicated the

fact, if any ; so that they might be called to corroborate or impeach him. The disclosure, therefore, came out accidentally ; and did not lay the foundation for a course of inquiry which the defendant had not a right to pursue upon the direct examination. Occurrences of this sort are not only common, but inevitable in almost every trial. It is impossible to anticipate what the answer of a witness will be, to a general question, until his answer is given. If it is of a nature which would have been inadmissible upon a direct and specific inquiry, the course is, not to permit the inquiry to be pursued, and the evidence to be repelled by other testimony ; but to exclude the answer from the consideration of the jury, so far as it was improper to have been given. There is no danger of a jury being misled or prejudiced by such a circumstance. The presiding judge will explain to them why they are to disregard the evidence ; and that no inference is to be drawn from it against the opposite party, because he is precluded from pursuing the inquiry, and explaining it. If the plaintiff's counsel had asked specifically, whether the witness ever communicated the information in relation to the note to *Porter*, what *Porter* said on that occasion would probably have been competent evidence ; for the inquiry could have been made with no other view, than to raise the presumption of his admission of the genuineness and validity of the note ; and that presumption the opposite party, of course, ought to be permitted to repel. The question would be considered as embracing, not only the information communicated by the witness to *Porter*, but *Porter's* answer also ; and the answer would then be evidence against the plaintiff, having been called for by him. But there would be no safety in putting a general question to a witness upon his cross examination, if his answer might be the means of rendering the declaration of the opposite party evidence in his own favor, without being called for by his antagonist.

The remaining objections are to the charge of the judge.

ter his death. 3. By proving the declarations and admissions of the plaintiff, that the note was given for *the security of the will*, as he expressed it. To these declarations, several witnesses testified; *Noah Clark, Israel Phelps, Jesse Carpenter, Solomon Stockwell and Robert Eells.*

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The defendant then rested; and the plaintiff called witnesses to prove that this note had been recognized and admitted by *Porter*. That it was composed of several smaller notes, one of \$500, one of \$450, and several others, the amounts of which were not recollected by the witness; and \$450 in cash; and a book account, &c. That he repeatedly declared that he owed the plaintiff money, and offered his farm for sale; and demanded \$2000 down; and then told the plaintiff, he being present, that if he sold his farm he would pay him. On other occasions, he declared he owed the plaintiff a great deal of money, as much as his farm was worth; and that he could not pay him without selling his farm.

Thus, the effort on the part of the plaintiff, was, to sustain the note, by proving an actual pecuniary consideration for it; either by express proof of that fact, or by implication, from the acknowledgment and recognition of the note by *Porter*. He did not pretend that it was given for any other consideration; and all the evidence on his part was intended to repel and rebut the evidence given on the part of the defendant, the object of which was to show, either that the note was fraudulently obtained, or altered by the plaintiff; or if not, that it was given as a guaranty against the change of *Porter's* will. All the evidence as to the latter point, consisted in the proof of the plaintiff's declarations and admissions. The plaintiff, of course, gave no evidence in support of that allegation.

Upon this state of the evidence, after the counsel for the defendant had submitted the written legal proposition to the judge, which has already been stated; the plaintiff's counsel also submitted a proposition, upon which they asked the judge to instruct the jury. It was, "that if, from the facts in the case, the jury believed, that the plaintiff, having the will of *Porter* in his favor, was apprehensive

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that *Porter* might will the farm to some one else ; and was, *therefore, about to leave him* ; and that *Porter*, to induce him to remain with him, and labor for him while he lived, gave him the note in question ; and that the plaintiff faithfully performed that agreement on his part ; that it was a sufficient legal consideration for the note ; and if they believed that the note rested wholly upon this consideration, or upon this, coupled with a pecuniary consideration, as to a part of the amount, that the note in either case was founded upon a sufficient legal consideration." In relation to this proposition, the judge remarked to the jury, that it was substantially correct ; and that they were to consider whether the note had been given upon a full and valuable consideration, either for money due, or money and services rendered, *or to be rendered*, by the plaintiff for *Porter*, *or on the consideration stated in the proposition, submitted by the plaintiff's counsel, which was supported, the judge observed, by the evidence to be drawn from the confessions of the plaintiff, compared with other evidence.* And if they should be of opinion, from the evidence, that either of the considerations alluded to was the consideration of the note, and that the plaintiff had performed what he had undertaken on his part, and that no fraud or imposition had been practised by the plaintiff, in obtaining the note, then it was supported by a sufficient legal consideration ; and the plaintiff would be entitled to their verdict.

It appears to me, that this charge was calculated to mislead the jury. There was not a particle of evidence that the note was given upon the consideration mentioned in the plaintiff's proposition, to wit : that *Porter*, having made his will in *Winchell's* favor, and *Winchell* being apprehensive he would change it, was about to leave him ; and that *Porter* then, to induce him to remain and work for him as long as he lived, gave him the note in question. It will be perceived that the previous will had nothing to do with the consideration supposed. And all that relates to it might be expunged without affecting the legal character of the proposition. It is neither more nor less than this : that if *Winchell* agreed to live with, work for, and

take care of *Porter* during his life, and in consideration thereof, *Porter* gave him the note for \$2100, and *Winchell* performed his part of the agreement, there was a good consideration for the note. Now there was not a particle of evidence of any such agreement or contract. The confessions or declarations of *Winchell*, as proved, were, *that the note was given to secure the will*, or for fear *Porter* would alter his will, and cheat him out of his property, and earnings.

But the judge also charged the jury that this consideration was supported *by the evidence to be drawn from the confessions of the plaintiff*, as proved on the part of the defendant; thus making the plaintiff's own confessions and declarations evidence to support a consideration, totally different from that which he had endeavored, during the whole course of the trial, to prove was the true consideration; and which he had produced witnesses to support by their oaths. If the consideration for this note was not entirely pecuniary, then *Benjamin Shattuck*, the principal witness for the plaintiff, was guilty of the most gross and deliberate perjury; and must have been suborned by the plaintiff himself. Can a party be permitted to go to a jury upon two distinct and entirely contradictory and irreconcilable grounds? Suppose the plaintiff had first proved that the note was given upon a pecuniary consideration; but apprehensive, from the evidence given by the opposite party, that his witnesses would not be credited, had then called another lot of witnesses, who testified that it was given upon the contract or agreement which has been supposed: in the first place, would he have been permitted to do it? and if he had been, should the jury have been instructed, that either of the considerations proved, would support the note? Ought they not rather to have been charged, that the witnesses effectually destroyed each other; and that neither were entitled to credit? That the plaintiff, by taking two contradictory grounds, had deprived himself of the benefit of both? Can the declarations of the plaintiff himself, when proved by the defendant, be more available to the plaintiff than the same facts

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would be, if the plaintiff himself had established them by competent evidence? If the plaintiff had acquiesced in the evidence given by the defendant, as to the consideration of the note, and had reposed himself upon it as a legal consideration, there would have been no objection to it. But instead of that, he denies that that was the consideration; and produces a multitude of witnesses, to establish another and entirely different one. He maintains, and he labors by his evidence to prove, that the declarations which he is shown to have made as to the considerations, were false; and yet the jury are instructed that if they believe those declarations, the plaintiff is entitled to recover.

Under these circumstances, the case appears to me to bear a strong analogy in principle to that class of cases in which it has been held, that, where the consideration is set forth in a written contract, evidence to show that a greater or different consideration was intended, is inadmissible. (1 *John*. 139. 3 *John*. 506. 7 *John*. 341. 2 *W. Bl* 1249.) That rule, it is true, is founded on the established doctrine, that a written contract cannot be contradicted or varied by parol. But so far as that doctrine has any foundation in moral principle, independent of considerations of public policy, it is this: that a party shall be concluded by his own solemn declarations, and shall not be permitted to prove that what he has once declared in writing was the sole consideration was not so. With how much more force does the principle apply to a case, where that declaration is made by the oaths of moral and responsible beings, in the presence of God and man, swearing by the procurement, and at the instigation of the party himself; and where the contradictory evidence consists of his own declarations and confessions? To permit those declarations under such circumstances to be used in this way, appears to me to be subversive of all morals.

In this respect, therefore, we think the judge erred; and that a new trial must be granted.

New trial granted.

ALBANY,  
Feb. 1837.COLES *against* CARTER.Coles  
v.  
Carter.

ASSAULT and battery, tried at the *New-York* circuit, October 13th, 1825, before EDWARDS, C. Judge.

The plea was not guilty, with notice of *son assault demesne*, and *molliter manus imposuit*, in defence of the defendant's possession.

After proof had been given at the trial, touching the assault, the defendant offered in evidence the record of a former recovery by him for an assault and battery, in an action in the common pleas of *New-York*, by the defendant against the plaintiff, and one *Clason*, in which the very question now in controversy was tried. The record was objected to as not between the same parties; and because it was not pleaded in this action. The judge, however, received it. The weight of evidence was decidedly in favor of the identity of the question in the two actions of assault and battery, and that the points of trial were the same in both suits; but the judge left this (among other questions of fact) to the jury, who found for the plaintiff.

A motion was now made in behalf of the defendant, for a new trial, on the ground, (among others,) that the jury should have found for the defendant, upon the evidence of the former recovery.

*J. Anthon*, for the motion, relied on *Gardner v. Buckbee*, (3 *Coven*, 120,) and *Burt v. Sternburgh*, (4 *Coven*, 559,) as conclusive upon this point.

*G. S. Raymond*, contra, denied the application of those cases. He said, the first was in *assumpsit*, where special pleading is almost entirely dispensed with; and in the latter no question of pleading was raised. The rule is different in *trespass*, and *assumpsit*. In *trespass*, it is well settled, that a former recovery must always be pleaded. (3 *Burr*. 1353.)

*Curia*, per SAVAGE, Ch. J. In the cases of *Gardner v. Buckbee*, (3 *Coven*, 120,) and *Burt v. Sternburgh*, (4

A former recovery is not admissible evidence under the general issue, in an action of trespass; e. g. an action of assault and battery.

Whether it is otherwise in an action on the case, or *assumpsit*?  
*Quere.*

on the case ; the two first on contract, the last for fraud. They were also in a justice's court, where, at least, as great latitude in pleading is permitted, as in the higher courts. In *Lyon v. Tallmadge*, (14 John. 511,) on an appeal from chancery, *Spencer*, justice, says, "the decree in the former cause, to have been available, should have been pleaded, or relied on in the answer as a bar."

From all these cases, it seems to be settled, that evidence of a former recovery cannot be admitted under the general issue, at least, in trespass. I am of opinion, therefore, that the motion for a new trial be denied.

New trial denied.

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Johnson  
v.  
Bridge.

#### JOHNSON against BRIDGE.

ASSUMPTIT ; tried at the *Madison* circuit, *March*, 1826, before WILLIAMS, C. Judge ; when a verdict was found for the plaintiff.

Certain exceptions were taken to the decision of the judge ; who sealed a bill of exceptions, on which

*J. A. Spencer*, now moved for a new trial. He cited 5 *John. Rep.* 118 ; 5 *Cowen's Rep.* 376.

*P. Gridley*, contra, cited 16 *John. Rep.* 226 ; 19 *id.* 49, 52.

The facts, with the points decided, are stated in the opinion of the court ; which was delivered by

WOODWORTH, J. The plaintiff declared on a promissory note, dated *March 12th*, 1823, payable *June 1st*, 1824, to *Shelden Smith*, or bearer. The defendant gave notice of set off of a note, made by *Smith* to *J. A. Spencer*, or bearer, payable on demand ; and dated *July 12th*, 1825. Also a judgment obtained by the defendant against *Smith*, in *June*, 1825.

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A set off cannot be made, of a debt or demand against any one, other than the plaintiff on the record.

Thus, where the plaintiff purchased a negotiable promissory note of the payee, after the note was due ; and the payee was indebted at the time of the purchase to the maker ; in an action by the holder against the maker ; held, that the demand of the latter could not be set off against the holder ; and that it was not in any view, a defence to the action.

But it must always be understood as inseparable from that principle, that the equity, or defence relied on, is such as may be used consistently with the established forms of proceeding in a court of law. They cannot be made to yield to the particular hardship, if any, of a given case. A set-off is only available, in consequence of the statute, and in the manner there pointed out. When a defendant cannot place his defence within its provisions, he can derive no benefit from it. In the case of negotiable paper, a defendant who has a *bona fide* set-off may sustain an injury: but it is for the legislature to extend the remedy. This construction of the act does not impair any defence, not depending on the question of set-off. If the defendant had paid the note in fact, or shown it was not valid in its origin, or otherwise discharged, before transfer, and after due, no difficulty would lie in his way. But that is not the case. The ground of defence is a set-off, which would be unobjectionable in an action in the name of the payee; but is not valid against the plaintiff, who sues in the character of endorser, or bearer. The motion for a new trial must be denied.

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Townsend  
v.  
Carman.

New trial denied.

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TOWNSEND & TOWNSEND *against* CARMAN, impleaded  
with Ring.

DEBT on judgment, tried at the *Albany* circuit, *September 6th*, 1826, before DUER, C. Judge.

The judgment declared on, was in favor of the plaintiffs against *Ring*, as impleaded with *Carman*; the latter not being brought into court or appearing. This appeared up-

Debt lies on a judgment against two joint debtors, though one was not arrested; and did not appear in the original action.

In debt on such a judgment, it is sufficient, in answer to a plea of the one who was not taken in the original action, that the debt for which that action was brought, was the sole debt of the other defendant, to prove the sole admission of the former, that the debt was joint.

As to the one who was taken, *semb.* the record is conclusive that the debt was joint. Whether it is conclusive against both? *Quere.*

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~~~~~  
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Carman.

on the record in the original action. And now *Carman* pleaded those facts to this action ; and also that the promises, &c. for the non-performance of which, the judgment in that action was rendered, were the promises of *Ring* solely : and not the joint promises of both the defendants. Replication, taking issue on their being the sole promises of *Ring*, and not the joint promises of the defendants.

At the trial, the judge held that the only material question was upon this issue ; and he overruled the counsel for the defendants, who insisted that the record in the former cause was inadmissible as evidence ; and that no action could be maintained upon the judgment ; its operation being limited by statute. The judge also decided, that the jury need not pass upon the first branch of the plea.

The plaintiffs, therefore, had a verdict, on proving (by *Carman's* admissions, which were objected to as evidence,) that the original promises were joint. The defendants excepted ; and now on the bill of exceptions,

J. L. Wendell, for the defendants, moved for a new trial.

P. S. Parker, contra.

Curia, per SUTHERLAND, J. It is admitted, on the face of the pleadings, that the judgment was obtained in the manner stated in the plea. The judge, at *nisi prius*, therefore, decided correctly in saying, that the only enquiry was, whether there was a partnership between *Ring* and *Carman*, when the original debt was contracted. That was the only issue joined ; and it was the duty of the judge to try it, whatever might be his opinion of its materiality. The evidence given by *Cameron* and by *Wheeler*, was offered for the purpose of proving a partnership, from the confessions and admissions of *Carman* himself ; and not for the purpose of establishing an original individual liability on his part. The objection to its admission under the pleadings was properly overruled.

The general objection, that an action of debt cannot be maintained on such a judgment, is disposed of by the cases of *Dando v. Doll*, (2 John. 87.) *The Bank of Columbia*

v. *Newcomb*, (6 *John*. 98,) and *Taylor v. Pettibone*, (16 *John*. 66;) in all of which, the point was presented, and clearly and distinctly passed upon by the court. The statute (1 *R. L.* 521, *sect.* 13,) declares, that the plaintiff shall have his judgment and execution against such of the defendants as were brought into court, *and against the other joint debtors named in the process, in the same manner as if they had all been taken and brought into court, by virtue of such process*; and the only restriction imposed by the act upon the effect of the judgment and execution, is, "that it shall not be lawful to issue or execute any such execution, *against the body, or against any lands or goods, the sole property of any person not brought into court.*" There is nothing in the act, restraining the plaintiff from bringing an action of debt upon such judgment, against all the defendants; nor from using the judgment, as evidence of the indebtedness of all. If an action can be sustained upon such judgment, it must be against all. The judgment is to be entered in the usual form; and so far as depends upon the act, is to be followed by the usual consequences, with the restrictions particularly specified. The judgment is *prima facie* evidence of a debt against the party not brought into court. (16 *John*. 66.) How far, or in what respect, he may be permitted again to enter into the merits of the original action, and show that he ought not to have been charged, it was not thought necessary in the previous cases, nor is it in this, to determine. The defendant here, was allowed the benefit of the only defence which he claimed; that the original debt was contracted by *Ring* solely, and not by *Ring* and himself jointly. But he failed, in the opinion of the jury, in establishing that fact; and we see no ground for disturbing the verdict. The motion for a new trial must be denied.

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Carman.

· New trial denied.

The defendant below excepted; and the cause came here on the record and bill of exceptions.

Beck and Linn, for the plaintiff in error.

M. T. Reynolds, contra.

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Farnsworth
v.
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Curia, per SAVAGE, Ch. J. It is important, *first*, to ascertain the relative rights of the parties. By the 4th section of the act for the maintenance and protection of the *Erie* and *Champlain* canals, and the works connected therewith, passed *April 13th*, 1820, (*sess.* 43, *ch.* 202,) it is, among other things, enacted that, "if there shall be more boats, or other floating things, than one below, and one above any lock, at the same time, within the distance aforesaid, (100 yards,) such boats and other floating things shall go up and come down through such lock by turns as aforesaid, until they shall have passed the same; in order that one lock full of water may serve two boats or other floating things." By the 10th section, (*p.* 186,) it is enacted, "that, in all cases in which a boat, intended and used chiefly for the carriage of persons and their baggage, shall overtake any boat, or other floating thing, not intended or used chiefly for such purpose, it shall be the duty of the boatman, or person having charge of the latter, to give the former every practicable facility for passing; and, whenever it shall become necessary for that purpose, to stop, until such boat for the carriage of passengers shall have fully passed." And a penalty of \$10 is imposed for a violation of this duty.

It was evidently the intention of the legislature, that packet boats should not be detained by freight boats; as it was known that the packets would move faster than the freight boats; and, in the language of the act, *every facility* was intended to be afforded them. But the right of passing when both are in motion, might be of little use, if the packets must be detained at every lock until all the freight boats there have passed before it. The fair construction of the act undoubtedly is, that the packets shall have a preference on any part of the canal; and to be of

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ASSUMPSIT on a promissory note; tried at the *Oneida* circuit, *October*, 1825, before WILLIAMS, C. Judge; when the following facts appeared:

The defendants executed a promissory note, on the 19th of *March*, 1824, dated that day, and payable to the plaintiffs, by the style of *Graves, Griffin & Co.*, for \$537, on which was endorsed a payment. On the 3d of *December* 1823, *Griffin*, one of the plaintiffs, signed a note, of that date, *Graves, Griffin & Co.*, payable to the order of *John Johnson & Sons*, of the city of *New-York*, for \$472,65; and on the 11th of *October*, 1824, it was endorsed by them to the defendants, *without recourse*. The plaintiffs, *Graves, Griffin & Hickox*, had been partners in trade at *Paris*, in *Oneida* county; but by agreement in writing, dated and executed *April 1st*, 1823, dissolved their partnership. On the same day, a notice of dissolution signed with their names at length, was published in the *Utica Gazette*, printed in the county of *Oneida*, and put up at several places in the neighborhood of their residence. The notice stated that the business would be continued by *Graves & Griffin*, under a firm of that title; and they immediately after carried on business accordingly, at the place of the old firm. The plaintiffs did no business afterwards as partners. The defendants had knowledge of the dissolution, before the note was given to *Johnson & Sons*.

In *October*, 1824, the note to *Johnson & Sons* was shown to *Hickox*, who said it was an honest debt against the firm; but they could not avow it, as they could not then pay their old debts; that they must have the amount due from the defendants, to pay their bank debt; and the defendants ought not to have bought the note. After this, *Graves* said the plaintiffs intended to sue the defendants so quick that they could not set off the *Johnson* note. Three notes had been signed *Graves, Griffin & Hickox*,

General notice in the *Gazette* of the dissolution of a partnership is sufficient, as to all persons who have had no previous dealings with the firm.

But as to those with whom the firm has dealt, such constructive notice is not enough. Actual notice must be shown; otherwise, as to these, the act of one of the former firm in the partnership name, will bind all the former partners.

An authority to one partner, to sign notes in the partnership name, for debts of the firm, may be implied from circumstances.

From what circumstances such authority may be inferred.

At the trial, a note of this description was given in evidence without objection. The case states that the defendants proved that the signature of the note was in the handwriting of *Joel Griffin*; and that it was indorsed to the defendants by the payees. From this statement I infer that the payees composed a firm in the city of *New-York*.

If the note was valid against all the plaintiffs, when in the hands of *Johnson & Sons*, the defendants are entitled to the benefit, for they acquired the right of the payees. Whether the defendants had knowledge or not, of the dissolution, at and before the giving of the note, is perfectly immaterial. The contract in favor of *Johnson* was negotiable. Whether prosecuted in their names, or that of an indorsee does not affect the question of liability.

A further inquiry is, was the note of *3d December, 1823*, given for a debt contracted at that time, or previous to the dissolution of the partnership? This is a material fact. There is nothing expressly stated in the case on this point. If the cause had been submitted to the jury, one question would have been, whether the evidence warranted the inference, that the note was given for a debt contracted during the existence of the partnership? On the finding of this fact, would in part depend the question, whether the notice of dissolution was published in such a manner as to affect *Johnson & Sons* with notice? As the verdict is subject to the opinion of the court, we may draw the same conclusion from the facts proved, that the jury might have done.

I incline to think that, during the acknowledged existence of the partnership, the plaintiffs became debtors to *Johnson & Sons*. I infer this from the fact proven, that the plaintiffs did no business of any kind, as partners, after their dissolution in *April, 1823*; that *Hickox* admitted it as a joint debt against the firm, and spoke of it as an old debt; and the remarks of *Graves*, who does not seem to question their being indebted; but rather that the defendants could not avail themselves of a set-off. I should certainly understand the witness, who said the plaintiffs did

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that public notice in some reasonable manner must be given ; and that would conclude all persons who have had no previous dealings with the firm ; but as to persons in the habit of dealing with the firm, public notice was not sufficient by the English law. The necessity and justice of these rules, in that case, received the sanction of this court. It follows that *Johnson & Sons*, having dealt with the plaintiffs previous to the notice of the dissolution, cannot be affected by it. Although the giving of the note was a new contract ; yet, until notice of dissolution was given to *Johnson & Sons*, such partner was competent to bind the firm, to all persons not chargeable with notice of such dissolution.

Independent, however, of this ground, I think it may be inferred that *Joel Griffin* acted with the knowledge and assent of the former partners. It is not necessary to prove assent expressly. It may be inferred from circumstances. Perhaps a jury, had this question been submitted to them, might have considered the evidence not satisfactory. I cannot say, that had they found a verdict either way, I should be disposed to set it aside. That, however, is a question not before us ; we are called on to decide this fact. Upon mature deliberation, I am satisfied that neither *Hickox* nor *Graves* intended to draw in question the authority to give the note. *Hickox's* admission is express. When he says it was an honest debt against the firm, it must refer to the note ; for that was then presented to him. It was an admission that the firm were holden. There is no direct admission by *Graves*. He does not put this objection on the want of authority ; but on other ground. If there was no authority, the presumption is, it would have been suggested ; because that disposed of the question at once. Instead of doing so, he puts his objections on ground altogether untenable ; the commencement of a suit by the plaintiff so quick, as to defeat a set-off. This was said after the note was endorsed to the defendants. No matter how soon the plaintiffs prosecuted, they could not, by that act, gain any advantage. The right to a set-off was valid, provided the plaintiffs were liable on the

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children, one of whom is not a lessor. The extent of the plaintiff's claim was five tenths and seven eighths of another tenth of the interest of their ancestor in the premises in question. But it was conceded that the right of all the lessors, except the children of *Sarah Mulhollon*, were barred by the statute of limitations ; so that the recovery of the plaintiff, if he should be entitled to recover at all, could only be for seven eighths of one tenth of the interest of which *Arthur Erwin* died seised, in the premises in question. The premises were designated as *lot no. 4*, in the *Gore*, east of township 3, 5th range, (as surveyed by *Augustus Porter*,) in the town of *Canisteo*, in the county of *Steuben*, containing 162 acres. It was admitted, at the trial, that the defendant was in possession of that lot when the action was commenced. When that was, did not appear in the case, but the demise was laid on the 2d day of *May*, 1816.

Both parties derived their title from *Oliver Phelps*. The conveyance, under which the plaintiff claimed, bore date the 17th of *September*, 1790, and was from *Oliver Phelps* to *Arthur Erwin*, *Solomon Bennet*, *Joel Thomas*, and *Uriah Stephens*. It purported to convey to them, their heirs and assigns, "two tracts, or parcels of land, lying and being in the district of *Erwin*, county of *Ontario*, and state of *New-York*, being township number three in the 5th range ; also number four in the 6th range ; to be six miles square, and containing twenty-three thousand and forty acres each, and no more ; and known by the name of the old *Canisteo* castle." The consideration expressed in the deed, was £2666 13s. 4d. This conveyance was confirmed by *Nathaniel Gorham*, (who was a joint proprietor with *Phelps*, of the large tract, called *Phelps* and *Gorham's* purchase, of which these townships were a part,) by his deed of the 1st of *February*, 1792.

This tract was surveyed and run into townships by *Augustus Porter* and *Frederick Saxton*, for *Phelps* and *Gorham*, in 1789. The corners of the townships were marked, though the lines were not run so as to test the contents with accuracy.

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township, one mile in width, should be taken from township 4, 6th range; so as to leave township 3 six miles square, and township 4, 5 five miles by six. In pursuance of this arrangement, the deed of *September 17th, 1790*, was executed by *Phelps* to *Erwin, Bennet, Thomas and Stephens*, for the two entire townships; and they, on the same day, reconveyed to him one mile by six off the west side of township 4, 6th range.

Before these representatives of the company went to *Canandaigua* to consummate the previous contract, and soon after that contract was made, *to wit, on the 18th day of October, 1789*, they entered into a covenant with their eight associates, that they should have $\frac{1}{2}$ of the two townships purchased of *Phelps*. The eight associates covenanted to pay to them $\frac{1}{2}$ of the consideration paid for the land, and also the same proportion of the costs and expense of procuring it; to be paid in 3 equal instalments, on the *1st of May, 1790*, 1 and 2. The four covenanted to execute a good deed to the 8 associates for their shares, whenever they gave security for the payment of their proportion of the price and expenses.

The title to these two townships having been thus vested in the four, and they having given their associates legal evidence of their rights and interests, immediate measures were taken to survey and divide the townships into lots, and to distribute them among the partners.

Accordingly, on the *25th of September, 1790*, *Arthur Erwin* entered into a written agreement with the company, to survey the townships into lots, for the consideration of £95. He staked out all the lots in township 4, and part of township 3, before his death, in *June, 1791*; but the lines were not closed. On the *20th of September, 1791*, the associates, by an instrument in writing, appointed *Solomon Bennet, John Jamison* and *Uriah Stephens*, junior, a committee, *to assize and proportion the lots*, and superintend the surveying thereof. This instrument was signed by 7 of the original associates, and by *Joseph Erwin*, the son of *Arthur*, who professed to be the administrator of his father's estate, and to represent the family in the partition

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from 1791 to the commencement of this suit in 1816. The survey and division thus made, was carried into effect by an agreement in writing, signed by several of the proprietors, and by *Joseph Erwin*, who declared himself to be the agent of the *Erwin* family, and professed to act for them. But no other member of the family was present, or participated in any of these proceedings. Nor was there any evidence of *Joseph's* authority to act for them, except what was derived from his own declarations, and their long acquiescence. Conveyances were executed by all the surviving associates, in conformity to the corrected survey of *Porter*; and all their acts and proceedings have practically admitted its correctness.

After the survey of *Porter*, the proprietors, *Phelps* and *Gorham*, treated and disposed of the lands within the gores in the same manner as they did the other parts of their purchase. On the 18th of *November*, 1790, they sold and conveyed to *Robert Morris*, the greater portion of their purchase, including the gores. *Morris*, on the 11th of *April*, 1792, conveyed to *Charles Williamson*; who, on the 16th day of *December*, 1793, conveyed the premises in question to *John Moore*, the defendant. The residue of the tract was conveyed by *Williamson* to Sir *William Pultney*, on the 13th of *December*, 1800; and from him, through several decents and devises, it has passed to the trustees of Sir *John L. Johnstone's* will, who are now the proprietors of what is undisposed of. *Robert Troup*, Esq. is their agent, in the management of this immense tract.

Arthur Erwin, on the 23d of *August*, 1790, purchased from *Christian Kress*, one of the original associates, his share of the two townships; which *Kress*, on that day, conveyed to him by a quit claim deed.

Verdict for the plaintiff, subject to the opinion of the court, on a case; with liberty to either party, to turn it into a special verdict, or bill of exceptions.

E. Griffin, for the plaintiff, briefly opened the case; and stated the grounds on which the plaintiff relied. He said he had found no case where the description in the deed

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will, to transfer what he has to another. (*Hob.* 229.) There is no technical force in words describing parcels; though it is otherwise as to the quantity of interest. (*Cowp.* 9. 7 *John.* 217. 18 *John.* 81. *id.* 107.)

The intention of the parties should govern. (*Cowp.* 600. 1 *Burr.* 282. 3 *Atk.* 136. *Willes*, 332.) Here it is plain. The sale was by count; and when the grantees get their count, the deed is satisfied. We rely on the words *to be*, as peculiarly expressive of intention. They meant, if the towns should turn out to be more than 6 miles square, they should be reduced to 6 miles. The words are restrictive. (*Shep. Touch.* 88. 1 *Co. Rep.* 154, b. *Hob.* 275. *id.* 175. 1 *Wood's Convey.* 355, *Powell's note.* 18 *John.* 110. 2 *Caines*, 327. 5 *John.* 345.) There is no difficulty in the location. The words of the description are answered, if the towns are reduced to six miles square in any way. When this is once done, it is final. *Id certum est quod certum reddi potest.* (*Shep. Touch.* 250. 10 *Co.* 64. *Hob.* 174. *Perk.* § 73. *Bac. Max. Rule* 23. 3 *Bac. Abr. by Gwill*, 391, tit. *Grants*, (*H.*) 1 *Leon.* 30. *id.* 254. 1 *Rol. Abr.* 725. 14 *Mass. Rep.* 149. 17 *id.* 211, 12. 3 *John.* 387.) A location by a part of the grantees is enough; and binds the others. A location by one of several grantees will bind, where the grant is to be located by the election of the grantees. (*Co. Lit.* 145, a.) This need not be done by the name of location. Any words or acts amounting to it are sufficient. (1 *Rol. Abr.* 725. *Wing. Max.* p. 21, *Max.* 15.) If the grantee die before the location is made, the grant is void. (*Co. Lit.* 145, a. 2 *Co. Rep.* 36, a. 1 *Leon.* 253. *Hob.* 174. 13 *John.* 212.) It may be void as to one, but good as to others. (*Sh. Touch.* 81. 4 *Cruis. Dig.* 313. § 1, pl. 8.) In this view, if a location was necessary, the property never vested in *Erwin* at all.

The cases cited against us, are cases of intention; and cannot be wrested to pervert the meaning of the parties. (9 *John.* 267.) They go on the ground that the words of quantity in the deed, were intended as mere words of description or estimation. Not so in this case. To call them

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Again, if *Erwin*, the grantee, had any title to the gore, he held as a trustee with others, (3 *Ves.* 696; 12 *id.* 74; 5 *John. Ch. Rep.* 12, 18;) and on his death, the title survived to the co-trustees. Thus, the *legal* title passed from his heirs by his death. (2 *Coven.* 229. 1 *R. L.* 54, s. 7.) Nor is this a case where the court will presume a conveyance to the heirs from the co-trustees. They will sometimes do so, as between trustee and *cestui que trust*. (2 *T. R.* 684. 8 *id.* 122. 2 *John. Cas.* 321, 5.) But this is only under special circumstances; as where the equity is plain. (7 *T. R.* 50. 11 *East*, 483. 7 *T. R.* 2, 3. 4 *id.* 683. 8 *East*, 263, 266, 7.) Courts of law never interfere in this way, where the equity is doubtful; (1 *T. R.* 737; 2 *John. Cas.* 325; 4 *John. Ch. Rep.* 310; 5 *id.* 184;) or when there are facts to rebut the presumption of a conveyance. (2 *John. Rep.* 226.)

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Here is at least a resulting trust, that may be proved by parol. (3 *John. Rep.* 221. 11 *id.* 96. 13 *id.* 63. 16 *id.* 197. 1 *John. Ch. Rep.* 582. 2 *id.* 405.) This resulting trust may exist, whether there be one or more purchasers. The money advanced by the ostensible purchasers was, by arrangement and agreement in writing, for the use of themselves and others. They acted as agents for the 12 associates; and the trust resulted to the whole. (1 *Atk.* 59, No. 414. 2 *Ves. and Bea.* 388. 2 *John. Ch. Rep.* 410.)

Lastly, the claim of the plaintiff is barred by the statute of limitations.

J. Platt, in reply. There cannot be a doubt, upon the various cases decided by this court, that the whole of the two townships passed to the four grantees, whether those townships were more or less. On this point, we have referred to the leading cases; nor need we do more. They are in point to the principles of construction for which we contend. If the deed be not good for the whole, it is void for uncertainty. No human being can tell where the six miles should be taken. If there was a mistake, a court of equity alone is competent to relieve. The townships had been surveyed, and their boundaries known and

may be as precisely and definitely described by its number, as by metes and bounds. A large portion of the land in the western district of this state, is held under conveyances containing no other description or designation of the premises intended to be conveyed, than the number of the lot; and it is perfectly settled, that when a piece of land is conveyed by metes and bounds, or any other certain description, all included within those bounds, or that description, will pass, whether it be more or less than the quantity stated in the deed. And when the quantity is mentioned, in addition to a description of the boundaries, or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity being the least certain part of the description, must yield to the boundaries or number, if they do not agree. (*Jackson v. Barringer*, 15 *John*. 471. *Powell v. Clark*, 5 *Mass. Rep.* 355.) If a man lease to another the meadows in *D.* and *S.* containing 10 acres, and they in truth contain 20, all shall pass. (13 *Vin. Abr.* 79, *plac.* 24.)

In construing deeds, effect is to be given to every part of the description, if practicable; but if the thing intended to be granted, appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated; but those circumstances will be rejected, as false or mistaken. (*Cro. Car.* 447, 473. *Jackson v. Clark*, 7 *John*. 217. *Jackson v. Loomis*, 18 *John*. 81. 4 *Mass. Rep.* 146. 5 *East*, 41.)

What is *most material* and *most certain* in a description, shall prevail over that which is *less material* and *less certain*. Thus, course and distance shall yield to natural and ascertained objects; as a river, a stream, a spring, or a marked tree. (1 *Cowen*, 612. 5 *Cowen*, 371. 6 *Wheat.* 582. 7 *Wheat.* 10.)

To apply these principles to the case before us: It is contended by the defendant, that the words, *to be six miles*

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out upon the admission, that their rights were definitely settled by the deed ; and that the only question was as to its construction. No future or prospective sense is therefore to be attached to the words "*to be.*" Every thing was complete and executed. The whole descriptive part of the deed was intended to designate a *present* subject of conveyance. To put a different construction upon it, would be inconsistent with the very nature of the transaction, and the manifest intention of the parties.

The words, "township no. 3, in the fifth range," constituted, of themselves, a perfect description ; and designated the subject of the conveyance, beyond all doubt or ambiguity. If no other terms of description had been used, there would have been no difficulty in locating the grant, nor any doubt that the whole township would have passed. The subsequent part of the description, "*being, or to be, 6 miles square,*" &c. is inconsistent and irreconcilable with that which preceded it. The one or the other must, therefore, be rejected. We have seen that that must be retained which is most certain and most material ; and that the number of the township is, of itself, a perfect description. If the number of the township be rejected, there is no description left. It is a tract of land in the district of *Erwin* and county of *Ontario*, six miles square, and containing 23049 acres ; but in what part of the district or county, there is no means of ascertaining. The grant would, therefore, be void for the want of a sufficient designation of the subject. But suppose those terms to be retained, and to operate by way of restriction or limitation ; how are the six miles square to be located ? From which part of the lot is the excess to be taken ? From the *north*, the *east*, the *west* or the *south* side ? The truth is, that no location could be made under the deed upon that construction ; and it would have been void for uncertainty. Upon what principle did *Phelps* ascertain that the excess was to be taken from the *east* side of township 3, and the *north* side of township 4 ? Could he have recovered those portions of the townships from the proprietors, if they had been in possession, in an action of

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The deed is not ambiguous, in a legal sense, so as to be subject to explanation or elucidation from extrinsic evidence.

The next inquiry is, whether the lessors of the plaintiff are concluded by a practical location of their deed, or an acquiescence in the corrected survey of *Porter*? It will be well recollected that *Arthur Erwin* died in *June*, 1791; that the gores were not run off by *Porter*, until the month of *August* in that year; and that no practical location was made, as to that township, by a survey and divi-

certainty. So, if there be a grant of the lands, or the farm called *A.*, "which descended to me from my father," these lands thus described by name will pass, although in point of fact they descended from the mother; but when there is a grant of "all lands which descended to me from my father," no lands can pass except such as descended in that manner; and the grant will fail of effect, unless there were some lands answering the description of lands descended from the father. A court of equity may correct the mistake, on proper evidence; but in a court of law the mistake does not admit of any explanation.

It will also be collected from the cases given by *Bacon*, in illustration of the rule, "*falsa demonstratio non nocet*," that in descriptions by positive certainties, it is sufficient that the first certainty be true, and subsequent errors will not destroy the grant; but when the grant is in general terms, by a reference to several circumstances, every circumstance forms an essential part of the description, and an error in one of them will be fatal. (*Dodgington's case*, 2 Rep. 32, b. *Preston's Shep. Touch.* 246, 247. The following instance may illustrate this observation:

Under a grant of "all my lands, which were formerly the inheritance of my grandfather, and also the inheritance of my father," no lands will pass except those in which each branch of the description can be authenticated by evidence; and the grant would fail of effect, although there were lands which were the inheritance of the grandfather, unless they also descended from the father; and lands which descended from the father would not pass unless they were formerly the inheritance of the grandfather. So when there is a grant of all lands which were the inheritance of *A. B.*, and conveyed by *C. D.*, the lands will not pass unless they were conveyed by *C. D.*, and also were the inheritance of *A. B.* Hence it seems an error, or at least inconvenient, in the assignment of terms, to refer, as is commonly done, to the lands as being the lands which were assigned by certain indentures bearing date, &c. and afterwards assigned by certain indentures bearing date, &c. &c. &c.; since the description is multiplied, and an error in either branch of the description would be fatal. But let it be remembered, that when the several deeds to which reference is made, are for the purpose of embracing lands under distributive descriptions, so as to comprise lands described in one deed, and lands described in another deed, the different lands may well pass; and an error in one of the deeds will not af-

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fect the lessors. There is no evidence that he was the authorized agent and representative of any portion of the *Erwin* family. He must be considered therefore, as speaking and acting for himself alone. That the lessors have accepted their portion of the townships, as ascertained by the division made upon *Dunham's* survey in 1792, is highly probable, though it does not appear from the case. It does appear from the testimony of *Thomas M'Burney* and *Dugald Cameron*, that other members of the family have paid the taxes upon their undivided portions of the *Erwin* share ; but even that fact is not proved in relation to the *Mulhollons*.

It is not a case in which a grant will be presumed, for the sake of quieting ancient possessions. It is the ordinary case, of a legal title on one side, and an adverse possession short of twenty years on the other ; unsupported by any admission or recognition of right derived from the acts or declarations of the lessor of the plaintiff, or those under whom they claim. In *Jackson v. Lunn*, (3 *John. Cas.* 109,) a deed from the original patentees to Sir *Peter Warren* was presumed, under the following circumstances : The patent was granted in 1735 ; and the tract immediately surveyed and laid out into lots. In 1736, Sir *Peter Warren* asserted his claim to the whole tract ; and took possession of it, by executing *eleven leases*, for different lots, to different persons, for lives, with a reservation of rent ; and by putting the lessees into possession of the demised premises. In 1737 and 1742, he paid the quit rents on the whole tract, and died in possession in 1752, by which the descent was cast upon his heirs. In the year 1767, these heirs leased two other lots, reserving rent ; and at the commencement of the revolutionary war, there were about 100 settlers on the land, all of whom acknowledged the title of the heirs. The defendant came into possession about 35 years after the first entry by Sir *Peter Warren* ; and the court remark, that it is necessarily to be inferred, from the case, that he entered in subordination to his claim ; as it is stated that that claim was not disputed, and consequently was admitted by *all* the

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A grant of land will never be presumed, unless the lapse of time is so great as to create the belief that it was actually made; or unless the facts and circumstances in the case, show that the party to whom it is presumed to have been made, was legally or equitably entitled to it. (1 *Coup.* 102. *Bull. N. P.* 74. 3 *T. R.* 157, 8, 9. *Phil. Ev.* 121, *et sequ.*; and 129, note (a).) None of those circumstances exist in this case.

If the whole townships passed by the conveyance of *September*, 1790, as we hold they did, then there certainly was no legal obligation on the part of the grantees to reconvey any part. Nor were they equitably bound to do it. If the township had contained less than was supposed, they would have had no claim on the grantor for the deficiency. The parties took their chance as to the size and contents of the townships; and neither was legally or equitably responsible for the result.

Those of the proprietors who have recognized the title of *Phelps* to the gores, would probably be concluded by such recognition. But the lessors of the plaintiff cannot be affected by their acts.

The only remaining inquiry is, whether *Arthur Erwin* had a legal interest in the two townships to any extent, which descended to his heirs. The defendant contends that *Erwin*, *Bennet*, *Thomas* and *Stephens*, to whom the conveyance was made by *Phelps*, were trustees for the 12 associates; that they, therefore, held those townships as joint tenants, within the exception in the 6th section of the act, "regulating descents," &c. (1 *R. L.* 54;) and that, upon the death of *Erwin*, the legal title survived to his co-trustees.

The trust is not declared on the face of the deed. It is an absolute conveyance, in fee, to the four grantees. It is necessary, therefore, to resort to the instrument by which the trust is declared or proved, in order to ascertain its nature and extent. A trust, (other than a resulting trust,) must be manifested or proved by writing; though it may be created by parol. And the declaration of trust need

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As to the  $\frac{1}{4}$ , then, there could have been no survivorship. Suppose the 8 *cestuis que trust* had conveyed all their interest to the 4 grantees; would not the effect have been, to have extinguished the outstanding equity, and to have left them seised, as they would have been, if it had never been created? that is, as tenants in common, the share of each to descend to his heirs?

Without deeming it material to determine whether the statute applies to any other than *pure trusts, declared on the face of the deed, such as trusts to executors to sell or to trustees to sell for the benefit of creditors*, we are clearly of opinion, that there was no survivorship as to the  $\frac{1}{4}$  which belonged to *Arthur Erwin*, and that the legal title to these descended to his heirs.

The plaintiff is, therefore, entitled to recover  $\frac{1}{4}$  of  $\frac{1}{4}$  of  $\frac{1}{4}$  of the premises in question, upon the demise of the children of *Sarah Mulhollon*. She was married in 1777, before the death of her father; she was covert until 1809, and her husband survived until 1815. The 10 years after her death, allowed for the children to bring their action, had not expired when this suit was commenced. They are therefore, not barred, within the case of *Jackson v. Johnson*, (5 Cowen, 74.)

Judgment for the plaintiff *pro tanto*.

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*W. Mulock*, for the plaintiff in error.

Though a tender on the land would have been sufficient, (*Co. Lit.* 202, *a*; 7 *Rep.* 370; *Co. Lit.* 105, *a*; *Hob.* 208; *Rol. Abr.* 427;) a personal tender is equally so. (8 *John. Rep.* 370. 2 *Chit.* 681.) A tender, after the rent falls due, and at any time before impounding, is good. (17 *Vin. Abr.* 592, *Rent.*)

The landlord could not distrain for the costs of the distress warrant and affidavit. The statute, (1 *R. L.* 435, *s.* 5,) allows no charges incurred before distress made. Beside, as to the warrant, it was unnecessary. The landlord might have distrained in person. The statute, requiring the affidavit, makes no provision that it shall be paid for. We were not liable in any shape for either of these charges.

The objection on the bill of exceptions, is also sufficient ground for reversal. (*Stat. sess.* 38, *ch.* 153. 3 *Caines*, 128.) The tenant, by his default, making a distress warrant and affidavit necessary, should be holden to pay for it.

*J. R. Hedley*, contra.

If the plea of a personal tender of rent, not saying on the land, be good, yet it should aver, that the tenant was always ready, and still is ready; and he should bring the money into court. (*Story's Pl.* 422. *Willes*, 632. 2 *Wils.* 74.)

The signature, "*H. Abell*," to the jurat was sufficient. His office might have been shown, by extrinsic evidence; thus making out a compliance with the statute.

*Mulock* said, *tout temps prist* cannot be a necessary averment. The action is not to collect the debt. That is not in question; but whether the distress was rightful or wrongful. The tender made it wrongful. (2 *Chit. pl.* 633 and 498.)

*Curia*, per *SAVAGE*, Ch. J. 1. As to the demurrer. The defendants, no doubt, have a right to show that the plaintiff's plea is defective in substance. The objection taken by the judge was, that the tender should have been

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*Pl. 633 and 498,*) show that, in replevin, no such averment is necessary, though in covenant it is. And the reason I apprehend to be, that a tender takes away the right to distrain, till a subsequent demand and refusal. But a tender does not take away a right to prosecute on the covenant. It only prevents the recovery of interest and costs. In *French v. Watson*, (2 *Wils.* 74,) no tender was pleaded; but only a readiness to pay, which the court say is not issuable. In *Horn v. Lewin*, (1 *Salk.* 583; 1 *Ld. Raym.* 639, *S. C.*) it was determined that a protest of the money was not necessary in replevin; and in that case, the money was brought into court and accepted; but all was held superfluous, because the question was, whether the distress was rightful. In my judgment, therefore, the plea is good.

I can see no fault in the replication, in point of form. It protests the tender, which, as to this cause, admits it; because it is not denied.

But other matter is set up, which it is supposed avoids the tender, to wit, that costs had been incurred which should have been paid.

From the cases cited, it seems that a tender of the rent before an actual distress, renders the distress unlawful, but the case of costs incurred is not attended to. It is highly reasonable that costs should be paid, when they have been properly and fairly incurred. The rent was due on the 1st of *February*. The affidavit was filed on the 14th, the tender on the 16th, the distress was on the 20th. Before the tender, a warrant had been made to a bailiff. Our statute directs the retaining of the charges in case of sale. (1 *R. L.* 435.) A fair construction of the act, I think, must entitle the party distraining to his lawful costs at any time, after they have been incurred. It seems to me, therefore, that the replication is good, both in form and substance.

If I am right in my conclusion, the judgment of the court below, upon the demurrer, must be affirmed.

2. The only remaining question, is that arising on the bill of exceptions. By the act already referred to, no land-

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a judgment for \$652,17; tried at the *Ulster* circuit, *April 19th*, 1826, before BETTS, late C. Judge.

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The declaration contained three counts; substantially alike, except that the escapes were stated on different days: The defendant pleaded, 1. *Nil debet*, with notice of special matter; 2. In answer to the first count, a return before suit brought; and that the defendant, after that escape and return, safely kept the prisoner in his custody, until he went out of office, and then delivered him over to his successor. Replication, that the defendant did not keep and detain the prisoner in his custody, in manner and form, &c. The 3d and 4th pleas to the 2d and 3d counts, and the replications, were similar. There was also a fifth plea to the whole declaration, alleging that the judgments, executions, commitments and escapes, stated in the several counts, were one and the same; and a return before suit brought. Replication, that the escapes were different, and not one and the same.

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At the trial, the plaintiffs proved that *Lawrence* was arrested upon the *ca. sa.* *September 13th*, 1825; that he was seen off the limits 5 several times prior to the 1st of *January*, 1826; and had returned before that day. The action was commenced on the 2d of *January*, 1826; on which day, it was admitted, that the defendant, in due form of law, assigned the prisoner to his successor. It appeared that the prisoner was on the limits when the *ca-pias ad respondendum* in this cause was delivered to the coroner.

The plaintiffs offered to prove that *Lawrence* had given bail for the limits, and deposited \$800 as security; and that this suit was defended at his expense. The judge rejected the evidence; but charged the jury, that as it was alleged by the defendant, that the prisoner continued in his custody after voluntary return, if the plaintiffs had satisfactorily proved that after the escapes stated in the 1st and 2d counts, and the voluntary return of the prisoner, he had again made other escapes, the plaintiffs were entitled to a verdict. The jury found a verdict for the plaintiffs on each of the issues.



5 *Wentw.* 228, 229, 242; 2 *John. Cas.* 208; 6 *John. Rep.* 123; 10 *id.* 561; 2 *id.* 433; *Griffiths v. Eyles*, 1 *B. & P.* 413, 418, *per Eyre, Ch. J.*

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*Curia, per* WOODWORTH, J. It is very clear that the plaintiffs are not entitled to recover upon more than one count. There was only one judgment on which the prisoner was committed.

The important inquiry is, whether all the facts stated in the plea, were material? If they were, the plaintiffs ought to recover. But if the defence was complete on proving a voluntary return before suit brought, and that the prisoner was in custody when the action was commenced, the verdict ought to have been for the defendant.

The decision of this question will depend on the inquiry, whether the allegation that the defendant detained the prisoner in custody upon the voluntary return, until he was handed over to the new sheriff, was, or was not material. If immaterial, then it was not put in issue by the replication; (*modo et forma* only putting in issue matter of substance;) and, consequently, need not be proved.

On the argument of this cause, great reliance was placed upon the cases of *Griffiths v. Eyles*, (1 *B. & P.* 413,) and *Chambers v. Jones*, (11 *East*, 406.) If these cases were correctly decided, I admit that the law, as understood in *England*, is in favor of the plaintiffs.

With great deference for the learned opinions of the judges who then presided, I cannot yield my assent to the doctrine there advanced; believing it to be repugnant to the principles of the common law, and the weight of authority deducible from the decisions of their learned predecessors. Before I consider the two cases referred to, I will examine the doctrine as laid down in other authorities. The 2 *Bac. Abr.* 529, *tit. Execution*, lays down the rule, that if a prisoner in execution escape, without the assent of the sheriff, and he make fresh pursuit, and re-take him before any action brought, it shall excuse the sheriff; and that a voluntary return of the prisoner, before action, is equal to a re-taking on fresh pursuit. The prop-

cessary for the plaintiff to allege it in his declaration. It must be alleged in the replication. This case is approved in 10 Vin. 118, pl. 43, and 1 Lutw. 382, (3 Keb. 55, S. C.) Here there was no averment, that after the re-taking, the prisoner was kept in custody until suit brought; nor was it suggested by the court or counsel. So also in *Harvey v. Reynel*, (W. Jon. 144, Car. 2,) the declaration alleged an escape at D. in the county of H. The defendant confessed that the prisoner was committed in the county of S., and escaped; and that the defendant made fresh pursuit, and retook him before suit, and that he was in his custody; and demanded judgment. It was resolved on demurrer, that although the plaintiff alleged the escape at D., and the defendant confessed it at S., in another county, this was good, without a traverse of the escape at D.; for when a man is at large, it is an escape in every county. In *Whiting v. Reynel*, (Cro. Jac. 657,) the plea was, that the defendant had re-taken the prisoner, and yet hath him. No objection was taken to the plea, on the ground that it did not allege a continuance in custody after recaption. There might have been ten escapes and recaptions after the first; and yet, after the tenth, the prisoner was in lawful custody, which supported the averment in the plea. In *Chambers v. Jones*, (11 East, 408,) lord *Ellenborough*, after laying down the proposition that the plea must allege a continued detention to the time of action, refers, among others, to the case of *Whiting v. Reynel*, to support his doctrine. I apprehend it does not. So far from it, the detention averred, is an existing one when the action was commenced; which would be equally true, whether one or two escapes and returns had taken place between that time and the recaption or return, on the first escape made by the prisoner. The plea neither affirms nor denies a continued detention; and, manifestly, because, at that day, it was not deemed material. The case of *Chambers v. Gambier*, (Com. Rep. 554,) was also cited. There, in debt for an escape, the defendant pleaded, that, before action brought, the prisoner returned, and was in execution, for the damages on the judgment. On de-

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*time*; that is to say, whether he was then a prisoner; not that, at no time since the recaption, had he ceased to be a prisoner. Viewed in this light, it corresponds with all the cases I have referred to. The language of *Holt*, therefore, so far as it attempts to lay down law not applicable to the point then in issue, must be regarded as an *obiter dictum*; and is directly opposed to the case in *Strange*.

It is true, that in some of the books of precedents, the form of the plea is that of a continued detention to the time of action. Such are the pleas in 5 *Wentworth*, 228, 241, and *Lit. Ent.* 152. Indeed, the form of the plea in modern times, I apprehend, generally contains that allegation. But, as far as I know, it has been the sense of the profession, that the plea was supported, if the prisoner was actually in custody when the suit was commenced, provided the sheriff had not suffered a voluntary escape; and that the fact of the prisoner having escaped several times previously, and returned, did not invalidate the allegation of having remained a true prisoner. If the retaking, or return, purges the escape, it is the same as if no escape had taken place.

I have not been able to discover any adjudged cases previous to *Griffiths v. Eyles*, and *Chambers v. Jones*, that support the doctrine contended for by the plaintiffs, or seem to sanction it, except the case containing the dictum of *Ld. Holt*, which has been noticed. In *Chambers v. Jones*, it appears to me, the court principally rely on forms of pleas to be found in the books.

That the law was understood in *England* to be as I have attempted to show, is very evident from the case of *Bonafous v. Walker*, (2 *T. R.* 126.) The first count was for a voluntary escape; the second for a negligent escape. Pleas, 1. *Nil debet*: 2. As to the second count, recaption on fresh pursuit; and that the defendant had and detained the prisoner in execution for the damages; 3. As to the second count, that the prisoner returned; and continually after return, that the prisoner had been detained in execution. Replication, that the defendant did not diligently pursue the prisoner in order to retake him; and as to the

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turn, he was, under the pleadings, entitled to a verdict. But if the doctrine contended for be correct, the plaintiff had falsified the plea in a material part, by showing that the prisoner had not been, continually, after the return, detained in execution. Three escapes were proved; so that without reference to the first count, the plaintiff made out a right to recover on the second. It cannot be imagined that at that day, 1787, the court of king's bench considered the doctrine now advanced, as law; and especially, that if such had been the law, it should escape the notice of *Buller*, J., who is not only admitted to have been among the ablest lawyers, but ranked among the most skillful special pleaders of his time.

The case of *Griffiths v. Eyles*, (1 B. & P. 413,) is the first case I have met with that seems to be at variance with the law, as understood in *Bonafous v. Walker*. When the case in B. & P. was decided, 1799, *Buller* was a justice of the common pleas, having resigned his seat in the king's bench; but he was not a party to the decision of *Griffiths v. Eyles*, (April 30th, 1799,) having been absent from the 20th of April, to the end of the term, (May 6th,) from indisposition. *Heath*, J. was also absent; so that the law as there laid down, was by two judges only. I make this remark, as somewhat impairing the weight of that case, inasmuch as there is no reason to believe that judge *Buller* had changed his opinion since the case of *Bonafous v. Walker*; or that had he been present, he would have concurred in the decision in *Griffiths v. Eyles*. In this last case, the action was debt for an escape. The defendant pleaded a negligent escape and voluntary return, since which the prisoner had been safely kept. The replication admitted the escape and return; but alleged the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that alleged in the plea. The defendant, in his rejoinder, traversed the allegation that the prisoner had not been safely kept; and then pleaded to the latter part of the replication, a negligent escape, voluntary return, and safe keeping since, in the same manner as in the plea. The

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However that may be in *England*, where the sheriff may, or may not, allow the rules of the prison; and where these rules when allowed, are not analogous to the limits prescribed by statute for our prisons; it may be observed, that here, the allowance of the limits is imperative on the the sheriff upon giving security. Those limits are extensive; so that it cannot be presumed that the sheriff is able to state the number of escapes committed by a prisoner. Therefore, to apply the principle here, and say that the sheriff shall state all the escapes, would be, in most cases, the same thing as to say he should be liable for the debt, where several escapes had been committed, although, in each case, the prisoner had voluntarily returned. If the sheriff had discovered that his prisoner had escaped ten times, and returned, he would plead those returns, but the plaintiff who proved the eleventh escape, would recover; because, as to that, the defendant being ignorant that it had been made, had no means of protecting himself. Besides the unreasonableness of the doctrine, and unsupported, as I think it is, by the weight of authority even in the *English* courts, it is apparent that there is no necessity to adopt it for the purposes of justice.

If the prisoner is in custody when the suit is commenced, that is an answer to every claim on the ground of a subsequent escape. Why subject the sheriff for escapes which have been previously committed, and are necessarily purged by the fact that the prisoner is in actual custody when the suit is commenced.

If the plaintiffs relied on a subsequent escape, they should have new assigned; for the defendant is not bound to do more than give an answer to the escape or escapes in the declaration; which is done by excusing as many as are there alleged. In *Chambers v. Jones, Ld. Ellenborough* admits that a new assignment would be necessary, if it be not necessary to state a detention down to the period when the suit is commenced. The court of king's bench held that the new assignment was unnecessary, deciding that it was essential to state a detention; and show that it either continued when the action was commenced, or that

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require that, and no more. It has been shown that so are the pleas in all the old cases, and in several of those cited by *Ld. Ellenborough*. This court, in *Currie & Whitney v. Henry*, did not understand that such a plea implied a continued detention from the time of voluntary return, as the court of king's bench in the last case did. And therein consisted a difference of opinion on a material point.

In *Tillman v Lansing*, (4 *John*. 47,) the court lay down the law in an unqualified manner: "It is not to be denied, that fresh suit and recaption is a good defence against a negligent escape; and a voluntary return before suit brought, will also purge an escape of this description." So also in *Peters & Gedney v. Henry*, (6 *John*. 123,) the court say, "a voluntary return before action purges the escape." (7 *John*. 177, and 10 *John*. 549, 563, *S. P.*) In the case of *Richmond v. Tallmadge and others*, (16 *John*. 307,) in error, this question seems to have been put at rest. The chancellor, in delivering the opinion of the court, says, "the case is then reduced to this point: whether, to an action of escape, a plea of a voluntary return by the prisoner within the limits before suit brought, and that plea certified by the jury to be true in point of fact, be not a valid defence? Under the decisions of this court, there can be no doubt of the validity of such a defence."

It follows as a necessary consequence, if this is a valid defence, (accompanied with the fact which is always understood as connected with it, the prisoner being in custody at the time of suit brought,) that the plea, in this case, was perfect, without averring a continued intermediate detention; and although averred, it is surplusage, and immaterial. Taking an issue upon that part, makes an immaterial issue, and requires no proof by the defendant, to sustain it; neither can it avail the plaintiff, to prove it untrue. A subsequent escape was a distinct cause of action, not connected with the first escape, and no ground for reviving after it had been purged by a voluntary return.

On these grounds, without enquiring whether the defendant might not protect himself under the notice, I am

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void, by the destruction of the seals in the manner proved. He cited to this point, 1 *Gall. Rep.* 69; *Shep. Touch.* 69; *Dy.* 112; 11 *Rep.* 27; *Perk. s.* 135, 6; 2 *Bl. Com.* 308; 5 *Cowen*, 368.

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*M. T. Reynolds*, contra, cited 2 *Rol. Abr.* 29, (U) pl. 5; *Moore*, 35, pl. 116; 1 *Rol. Rep.* 40; 5 *Rep.* 119, b.; *Dy.* 59; *Cro. Eliz.* 120; *Palm.* 403; 6 *East*, 309, 311; 4 *T. R.* 339, per *Bull. J.*; 3 *T. R.* 151, 153, note (c).

*Curia*, per SUTHERLAND, J. The questions of fact were properly submitted to the jury. They have found that the defendant has not paid to the plaintiff the amount, which by his covenant he was bound to pay; and that the seals were torn from the agreement, by *Jackson*, under the mistaken supposition that the defendant had paid to him, upon that agreement, \$200, on the 1st of June, 1808, when, in truth, that payment was made by the plaintiff, and not by the defendant; and had been credited by *Jackson* to the defendant, by mistake. We assume, therefore, that the sum found by the jury is justly due to the plaintiff, upon the contract; and the question then is, whether his right of action is gone, in consequence of the seals having been torn off, under such circumstances.

It was a mutual agreement, signed by both parties. *Rees* covenanted to sell a farm to *Overbaugh*; and *Overbaugh* covenanted to pay him for it. There was no counterpart; and the agreement itself, instead of being retained by either party, was left in the hands of *Jackson*, as he expresses it, *for the benefit of both parties*. He did not hold it, therefore, exclusively as the agent of the plaintiff; nor had he any authority to receive *the whole consideration money*. His right to receive any portion of it did not result from the fact of his having the possession of the contract; for that he received as the agent of both parties, for safe keeping only. But *Rees*, the plaintiff, authorized him to receive \$2500, and pass it to his credit. That, then, was the extent of his authority; and he had no power to cancel the contract, or to interfere, in any other way,

alone. The plaintiff, in such cases, must make a *profert* of the deed *under seal*; and the deed or profert produced, must agree with that stated in the declaration, or the plaintiff must fail. A profert of a deed without a seal, will not support the allegation of a deed with a seal. But he remarks, that it is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In *Palm.* 403, a deed which had erasures in it, and from which the seal was torn, was held good, it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded. And in these days, he continues, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration which would obviate every doubt upon that point, by stating the truth of the case. It was not settled in *England*, that a deed *which had been lost or destroyed by time or accident*, could be pleaded, according to the truth of the case, without *profert*, until the case of *Read v. Brookman*, (3 *T. R.* 151;) and *Gross, J.* dissented from that decision. (Vid. *Soresby v. Sparrow*, 2 *Str.* 1186. *Whitfield v. Faugset*, 1 *Ves.* 387, 389. *Tolty v. Nesbitt*, and *Matison v. Atkinson*, 3 *T. R.* 153, note (c).)

Lord *Kenyon*, in *Read v. Brookman*, says, that which was supposed to be the old law, was founded on a mistake; and that the law of the country has, in this respect, in modern times, been better adapted to general convenience.

If a deed may be rendered available to a party, notwithstanding its total destruction, upon what principle can he be deprived of the benefit of it, when it has suffered a *partial injury*, either from accident, or the act of a stranger, over which he had no control? Lord *Kenyon*, in *Master v. Miller*, (4 *T. R.* 329, 30,) seems to admit, that an alteration in a deed, by accident, would not destroy it.

In *Henfree v. Bromlee*, (6 *East*, 309,) lord *Ellenborough* expresses a decided opinion upon this point. The question there was, whether an award was void, in consequence of an alteration made by the umpire in the

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mistake, or misapprehension of his rights, the defendant's remedy must be sought in a different way."

We are, therefore, of opinion that the motion for a new trial be denied.

New trial denied.

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JACKSON, *ex dem.* WILLIAMS and WASHBURN, *against*  
MILLER.

EJECTMENT for lot No. 14, in *Jessup's* little patent, *Warren* county, tried at the *Warren* circuit, *July 11th*, 1823, before *WALWORTH*, C. Judge.

The lessors of the plaintiff claimed title to the premises on several grounds; and, among others, under an alleged sale made by the commissioners of forfeitures, to the ancestor of *Williams*, one of the lessors; also on the ground of a prior possession in *Washburn*, the other lessor, against whom the defendant had some time before recovered the premises in question, in an action of ejectment, which was defended by *Williams*.

A verdict was taken for the plaintiff, subject to the opinion of this court.

The facts, so far as they are material to the points decided, are stated in the opinion of the court.

*J. L. Vile* for the plaintiff, cited 1 *Greenleaf's ed. L. N. Y.* 139; 1 *Phil. Ev.* 123, 302, 306, 312; 4 *Dall.* 415; 1 *Caines' Rep.* 89; 4 *T. R.* 642; *Bull. N. P.* 110; 11 *John.* 456; 3 *Mass. Rep.* 399; 10 *id.* 105; 13 *John.* 118; 1 *R. L.* 128, 9, s. 1, 2; 1 *Shep. Touch.* 256; *id.* 253; 3 *John.* 386; 6 *id.* 265; 4 *id.* 211; 10 *John.* 377; *Cowp.* 102.

A book purporting to contain the proceedings of the commissioners of forfeitures; but not proved ever to have been in their possession, though found in the clerk's office in 1806, and having lain 17 years there, is not admissible in evidence to show a sale by the commissioners; nor will a conveyance be presumed, where such a book is shown to be genuine, unless the requisites of the statute, creating the commissioners and defining their duty, appear to have

been complied with by the purchaser; and the certificate state that a conveyance was given. The certificate of the commissioners is not evidence of title; and a conveyance should be produced, or its absence accounted for, and secondary evidence given.

A prior possession is *prima facie* evidence of title in an action of ejectment; but where a recovery by ejectment is had against a prior possessor, he cannot set up his possession as the foundation of a recovery in a cross ejectment, unless it was of sufficient length to be evidence of title; as where it was for 20 years and more.

Where *A.*'s tenant from year to year takes a lease from *B.*, the act is void; and cannot work an adverse possession against *A.*

Parol declarations are inadmissible to prove or disprove title, or a disclaimer of title to lands.

commissioner, made by the county clerk, in pursuance of the act. The fact of its having been 17 years in the clerk's office can give it no validity. The clerk would probably have permitted any other manuscript to have been deposited in his office for safe keeping.

But suppose we are to consider this book as the official return of the commissioners, and to have been made within three months after the sale. By the act, one third of the purchase money was to be paid down, and the residue at a future day, (1 *Greenleaf*, 132;) and if the purchaser failed in the final payment, he forfeited the first payment; and the commissioner was to re-sell the land. (*id.*) The fact, therefore, that Gen. *Williams*, the ancestor of one of the lessors, became the purchaser, (and made the first payment, though even that does not appear,) cannot complete his title. He may, notwithstanding, never have received a deed. And if such a certificate is to be received as evidence of title, a purchaser who paid one third, but never completed his purchase, may, notwithstanding, obtain the property. The presumption is, that the commissioner certified all that was true in favor of the purchaser, particularly as he drew the certificate himself; and because, if a conveyance had been given, it was his duty so to certify. In *Jackson v. Woolsey*, (11 *John*. 456,) the court say, "It is correct here, to presume the commissioners did their duty." So here the commissioner would have certified a conveyance, if one had been given. It was his duty to give one, upon a certain contingency. Whether that ever happened, we know not; but the silence of the certificate raises a presumption against it. In *Van Dyck v. Van Beuren*, (1 *Caines*, 89,) there were facts to found a presumption upon; the provision in the will, that the daughters might purchase; the fact that *Hyletje*, one of the daughters, took possession at an early day, and that possession continued down to the time of trial. The case of *Gray v. Gardner*, (3 *Mass. Rep.* 399,) merely proves, that after a possession under an administrator's sale, the previous requisites as to notice, &c. will be presumed to have been regular. So in *Coleman v. Anderson*, (10 *Mass. Rep.* 105,) the same presumption was allowed in support of a collector's sale, after 30 years.

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be no reservation of rent ; the right to sue for use and occupation being equivalent to such reservation.

*Washburn*, who purchased from *Hall*, became the tenant of *Miller*. He became invested with the rights and liabilities of *Hall*. Four years afterwards, or 27 years before the trial, *Washburn* took an agreement for a lease from *Williams*. If this be considered an attornment, it is void, and would authorize an action of ejectment, without notice to quit ; but I apprehend it would not amount to an adverse possession against *Miller*. In *Jackson v. Johnson*, (5 *Coven*, 74,) a person who took possession under an agreement to purchase, was considered a tenant ; but it was held that the tenancy was put an end to by a subsequent purchase from a stranger ; and that after such purchase, the possession of the former tenant became adverse, because the act of the tenant was an assertion of title in himself. The conduct of *Washburn*, however, had a tendency to transfer the possession from *Miller*, the landlord under whom he entered, to a stranger. This is what was intended to be prohibited by the statute ; and such attornments are declared to be void. (1 *R. L.* 443. 1 *K. & R.* 145 )

But suppose the agreement with *Williams* was the commencement of an adverse possession ; it had not the necessary length of time to ripen into a right, before the commencement of *Miller's* action of ejectment, which was in *January*, 1814. The first negotiation with *Williams* was 27 years before the trial. That was in 1796 ; of course, but 18 years had elapsed.

Adverse possession for less than 20 years, will not afford ground to presume a grant. It is partly upon this presumption, that a title by adverse possession rests for its efficacy. (1 *Ph. Ev.* 126, and cases there cited.)

Having come to the conclusion, that the plaintiff cannot recover upon the strength of his own title, it seems unnecessary to examine that of the defendant ; but as the whole case has been examined, I will merely state my opinion upon it, without giving reasons at length. The defendant, being one of the patentees, must still be deemed

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ALBANY,  
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PACKARD *against* GETMAN.

TROVER for a box of dry goods ; tried at the circuit ; and a verdict found for the plaintiff for \$249,71.

*L. Ford*, for the defendant, moved for a new trial.

*J. W. Cady*, contra.

The facts are stated in the opinion of the court ; which was delivered by

WOODWORTH, J. This is an action of trover, to recover the value of a box of dry goods, alleged to have been delivered to the defendant as master of a canal boat, to be transported from the city of *Albany* to *Charlestown*, in *Montgomery* county.

Two questions arise :

1. Has the plaintiff proved a delivery to the defendant ?
2. If he has, is there sufficient evidence of a conversion ?

It appeared that before any goods were put on board, the plaintiff requested the defendant to receive a quantity of merchandize ; that he consented, and on the 20th of *November*, 1824, gave a receipt for 30s. in full, for transporting the plaintiff's goods, described as four boxes of dry goods, and other articles. The bill of lading, dated *November 24th*, in the hand writing of the plaintiff, and subscribed by the defendant, states four boxes of dry goods. On the evening of the 20th of *November*, the plaintiff came on board ; the defendant enquired what dry goods he had, and he replied four boxes. He then made out the bill of lading, and delivered it to the defendant. It also appeared that no more than four boxes of dry goods were actually received on board ; and after being so received, on the evening of the 20th of *November*, the plaintiff came and enquired for his goods. He was informed of their reception, went into the room where they were, and returned, saying it was all right. The defendant delivered the four

What will constitute a delivery of goods to the master of a canal boat, so as to make him accountable in trover.

If it be a sufficient delivery, according to the usages of business, to leave them on the deck by or near the boat ; yet this must be accompanied with express notice to the master.

Either case or trover may be brought against a carrier, for the non-delivery of goods ; but in the latter action, a conversion must be proved.

verted it. All the facts in the case negative that presumption. I am therefore of opinion, on the first point, that the plaintiff has not proved sufficient to make a delivery of the goods ; and that on this ground the verdict is against evidence.

As to the second question, if it be conceded, that the delivery, such as it was, made the defendant answerable, it is necessary to prove a conversion. The plaintiff might have brought a special action on the case, against the carrier ; and have avoided this question. He has brought trover, which will also lie ; but then he is bound to show that the defendant converted the goods. A demand and refusal, is *prima facie* evidence of a conversion ; but the defendant may give evidence to negative the presumption. (*Lockwood v. Bull*, 1 *Cowen*, 330.) I think it is plain the defendant never had actual possession of the goods. His witnesses swear that all the goods on board were delivered ; and it is fairly to be inferred, he had no knowledge of any more than four boxes. There is nothing on which to found a presumption that he clandestinely secreted, or in any way disposed of the fifth box. On the contrary, if lost to the plaintiff, it was without the defendant's knowledge or interference. On these facts, it ought to have been submitted to the jury, whether they were satisfied that the defendant had converted to his own use, the goods in question. The verdict must be set aside ; and a new trial granted, with costs to abide the event.

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New trial granted.

*J. A. Spencer*, contra, cited 13 *East*, 311 ; 3 *John.* 23 ; 5 *East*, 114. 16 *John.* 186 ; 1 *Str.* 683 ; 1 *Str.* 544.

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*Curia per SAVAGE*, Ch. J. On the hearing before the sessions, it was decided that the order of the justices was *prima facie* evidence of the facts it contained ; and that it was incumbent on the appellants to impeach it.

The practice was so settled in cases of bastardy, in *Sweet v. Overseers of Clinton*, (3 *John.* 26,) decided in February term, 1808. The legislature, in 1810, (*sess.* 33, *ch.* 109, *s.* 4,) enacted, that in appeals, as well under the act concerning bastards, as under that relating to the settlement of the poor, the court of sessions should begin *de novo* ; and the respondents were required to substantiate the order, before the appellant should be called on to impeach it. In the revision of 1813, the same provision is found in the act concerning bastards, (1 *R. L.* 310;) but nothing is said as to proceedings under the act concerning the poor. By the act repealing the acts previous to the revised laws, all acts and parts of acts, which come within the purview or operation of any of the acts called the revised acts, are repealed. (2 *R. L.* 556.) No provision on this subject, is found among the revised acts ; and as the statute of 1810 is not repealed by its title, but only so much as comes within the purview and operation of the revised acts, it remains in force. Perhaps the legislature thought the full re-enactment of that statute unnecessary. The decision in *Sweet v. Clinton*, related to a case of bastardy. It may have been thought, that regulating the practice in that case, was a sufficient expression of the legislative will, on the subject of appeals from orders of removal ; and as there is a close analogy in the proceedings in both cases, it would be incongruous to establish a different practice for them. This was so considered in the case of *Knox & Bern*, decided last term. The judges of the sessions, therefore, erred in considering the order as conclusive, until impeached.

On the main question, I think the court below was right. In 3 *Burn's Justice*, 375 to 380, 11th ed. the doctrine of

pose it to be wrong unless it appeared so. (*Burr. Sett. Cas.* 153.) In the case of *Dunsford & Willsborough Green*, (*Foley's Poor Laws*, 249,) it was held, that sending a woman away from her husband, was no divorce; for the husband, having no settlement, might come to his wife, as well at one place as another. *Blackstone* understands the rule to be, that the wife's settlement is suspended during coverture, if the husband remains in *England*; and is able to maintain her; but in his absence, or after his death, or (perhaps) during his inability, she may be removed to her old settlement. (1 *Bl. Com.* 363.) In a later case, *The King v. Eltham*, (5 *East*, 113,) the wife was removed to her former settlement, with the consent of the husband and wife. In the case of *Sherburne v. Norwich*, (16 *John.* 186,) the general doctrine is recognized. Mr. Justice *Platt*, who gave the opinion of the court, says the fact of the husband's inability was not proved; (the contrary was proved in that case;) but if it had been, it would be with great reluctance he would consent that a wife should be removed from her husband, merely because he was unable to maintain her. This was the individual opinion of that learned judge; but not the opinion of the court; as that question was not raised. Opposed to this, stands the opinion of the chief justice of the supreme court of *Connecticut*, in *Newtown v. Stratford*, (3 *Con. Rep. N. S.* 602.) The correct principle, he says, is, "that the wife's maiden settlement remains, having never been determined; but only, as it were, suspended during the time that she continued under the power and protection of the husband; and was maintained and supported by him." Until a new settlement is acquired, he says, there is not even a temporary suspension of this right, nor of the enjoyment of it; if the necessities of the feme covert imperiously require it. The separation of husband and wife, upon this principle, he adds, will always be voluntary; or arising from the coercion of his utter inability to support her.

I hope I duly appreciate rights of marriage to the individuals concerned, and to society. But I can see neither reason, propriety, or humanity, in compelling one

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CONTAINED IN THIS VOLUME.

A
ABSCONDING AND ABSENT DEBT-
ORS.

See DEBTORS, ABSCONDING AND ABSENT.

ABSTRACT OF TITLE.

Form of, and remarks upon. *Fuller v. Hubbard*, note (b.) 18 to 22.

ACTION.

An order was directed by a merchant at *Boston* to merchants at *Leghorn*, for 5 cases of *Leghorn* hats, without any directions as to the manner of packing or securing them. The *Leghorn* merchants, in executing this order, shipped the hats for *Boston* in a vessel which they knew was to touch at *Palermo* for a cargo of oranges and lemons; and yet neglected to secure the hats in the usual and customary manner; by reason whereof, they being placed in the hold on the boxes of fruit, were much injured, and sold at auction for less than the invoice price; *held*, that the *Leghorn* merchants, having undertaken to execute the order, were bound to do so in the customary manner; and not having done so, by reason whereof the purchaser sustained an injury, they were liable to him in an action for the damage. *Dickey v. Grant*, 310

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Vide AGREEMENT, 8. CANALS, 3, 4, 5.
ELECTION OF ACTIONS. ESCAPE, 8.
OVERSEERS OF THE POOR.

ACTION OF ASSUMPSIT.

1. An action lies for a false affirmation as to the credit of a third person, by which the plaintiff is induced to sell him goods, and is thereby injured; but not on the ground of a parol promise to endorse for the third person, by which the plaintiff is led to the sale; though the defendant know that such third person is insolvent at the time. *Gallagher v. Brunel*, 346
2. To warrant an action for a deceitful representation, it must assert a fact or facts as existing in the present tense. A promise to pay, though accompanied, at the time, with an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise; and if this be void, he has no remedy. *Id.*
3. In assumpsit on a promise to endorse the note of another, the declaration should aver that a note was drawn and tendered for endorsement. *Id.*
4. A sale of goods to *A.*, on the request of *B.*, is a good consideration for *B.*'s promise to pay for them. But the promise being collateral, should be in writing; otherwise, it is void by the statute of frauds. *Id.*

- executors, &c. or assigns. The parties agreed that *W.*, his executors, &c. or assigns, at his and their proper costs and charges, during the term, might take down the dwelling-house, and erect such other buildings, as he, his executors, &c. or assigns, might think proper; and that all such buildings and improvements, as should be so erected and made, and remaining on the demised lot at the end of the term, should be valued; (in a manner specified;) and *A.* should pay *W.*, his executors, &c. or assigns, the amount of the valuation, not exceeding \$1,500.
- Held*, that this was neither a building nor repairing lease; that the covenant to pay extended to a new building, to be erected at the option of the tenant; but that though the old house was not torn down, and a new one erected; yet the lessor was liable to pay for such additions to, and alterations of the old house, as amounted to improvements; not, however, for ordinary repairs; such as new roofing the old house, or re-building the chimney. *Lametti v. Anderson*, 302
4. The term being passed by mesne assignments to *L.*, though the improvements were not made by him; but mainly by the lessee, before assignment; in an action by the executors of *L.* on the covenant to pay for the improvements; *held*, that this covenant ran with the term, which, having passed to *L.*, by assignment, before the covenant was broken, carried the covenant to *L.*, who, or whose executors, might maintain an action upon it, in his or their own names. *id.*
5. Whether a declaration on a deed, with profert and oyer, can be supported by showing a deed lost after declaration filed, and not produced at the trial? *Quere.* *Jansen v. Ball*, 628
6. The lost deed may be received in evidence at the trial; and, if there be no surprise, and the execution of the deed is not contested, the plaintiff may afterwards amend his declaration, so as to make it conform to the case. *id.*
7. An instrument, purporting to be an assignment of a judgment, when, in truth, there is no judgment, and by which instrument, the party covenants that the judgment, as described, is due and unpaid, will subject him to an action for a breach of covenant. *id.*
8. The fact that there was no such judgment, if it be described as one in the supreme court, may be shown by a witness who has examined the dockets and transcripts of dockets in any one of the clerk's offices of that court, and failed to find the docket of the judgment described. *id.*
9. The measure of damages in an action on such a covenant, is the value of the property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit, with interest from the time when the money might have been raised by a sale. *id.*
10. The supreme court, on a motion for a new trial, will look into the evidence, and see whether, according to this rule, the damages are too high; and, if so, they will grant a new trial, unless, within a time to be fixed by them, the plaintiff remit so much as shall reduce them to the true sum. *id.*
11. Where the seals of an agreement were torn off by one with whom it had been left for safe keeping by both parties; *held*, that this did not destroy the deed; but an action of covenant would still lie upon it. *Rees v. Overbaugh*, 746
12. A stranger tearing off the seal, will not vitiate a deed. *id.*
- See ACTION OF ASSUMPSIT, 11. WARRANTY.
- ACTION OF DEBT.
1. Debt lies on a judgment against two joint debtors, though one was not arrested; and did not appear in the original action. *Townsend v. Carman*, 695
2. In debt on such a judgment, it is sufficient, in answer to a plea of the one who was not taken in the original action, that the debt for which that action was brought, was the sole debt of the other defendant, to prove the sole admission of the former, that the debt was joint. *id.*
3. As to the one who was taken, *semb.* the record is conclusive that the debt was joint. *id.*
4. Whether it is conclusive against both? *Quere.* *id.*
- See SURREGATE, 1, 2, 3, 4. TURNPIKE COMPANY, 1, 2.
- ACTION OF DETINUE.
- See PARTNERS AND PARTNERSHIP, 3.
- ACTION OF FALSE IMPRISONMENT.
- See PROCESS, 2.
- ACTION AGAINST HEIRS.
1. In an action against heirs, if they will show nothing by descent, or insufficient assets by

ACTION REAL.

1. The supreme court are governed by the same rules in relieving against defaults in real, as in personal actions. *Burick v. Hoag*, 398
2. And default for not pleading, will, at the same term when taken, the counsel who took it being present in court, be opened of course. *id.*

ACTION OF TRESPASS.

1. One, of two defendants, sued jointly for the same trespass, though he suffer judgment to pass against him by default, cannot be a witness for his co-defendant. Otherwise, if he plead, and there be no evidence against him. *Bohun v. Taylor*, 313
2. In trespass against several persons jointly, for the same act, the damages must be jointly assessed, though they sever in pleading; or one suffer judgment by default, and the trial proceed upon a venire *tam quam*. *id.*
3. In trespass *quare domum fregit*, held, that the defendants might show, in mitigation of damages, their motives and inducements to enter the house; as that it was to search for furniture which they had been informed was missing.

See CANALS, 3, 4, 5. ELECTION OF ACTIONS. EVIDENCE, 27.

ADVERSE POSSESSION.

1. Where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of other parts of the tract. *Jackson v. Richards*, 617
2. Whether a possession with claim of title, under a parol gift of land from the owner, is such an adverse possession as will bar an ejectment? *Quere. Jackson v. Whitbeck*, 632
3. A lease of a small tract of land, e. g. 63 acres, and actual possession by the lessee, of a part, with a claim of title to the whole, constitutes an adverse possession of the whole. *Jackson v. Vermilyea*, 677
4. And while it is so possessed, a conveyance, by any one except the adverse possessor, to another, of a part of the land so possessed, though it also include an adjoining parcel not so possessed, and the grantee enter upon the latter parcel, claiming to the whole extent of his conveyance, will not constitute the grantee, a constructive, or actual possessor, beyond the parcel on which he enters. *id.*

5. If one have constructive possession by color of title, and occupying a part; another cannot acquire a constructive possession to the same extent, in the same manner; but though the latter enter on part, with color of title to the whole, and claim the whole, his possession will be confined in extent, to the part which he actually occupies. *id.*

See LANDLORD AND TENANT, 14. TENANTS IN COMMON, 3.

AFFIDAVIT.

The affidavits of jurors cannot be received to show a mistake in making up their verdict, unless the mistake is produced by circumstances passing at the trial which are equivalent to a misdirection of the judge. *Ex parte Caykendoll*, 53

See CERTIORARI, 6. COMMISSION TO EXAMINE WITNESSES, 6. EJECTMENT, 4. INQUEST BY DEFAULT. JUDGMENT AS IN CASE OF NONSUIT, 1. MANDAMUS, 1. MOTIONS. PRACTICE OF THE CIRCUIT COURT. VENUE, 1, 2, 3, 5. VIEW.

AGREEMENT.

1. Where, on a contract to pay for, and receive a conveyance of land, the money has been paid, though a conveyance has not been given, the vendee cannot rescind the contract, and sue for the purchase money and interest; but must bring his action on the contract, as one still subsisting. *Fuller v. Hubbard*, 13
2. Where one agrees to convey land, on the payment of money, the vendee must not only tender or pay the money; but he must demand a conveyance; and after waiting a reasonable time for it to be made out, must present himself to receive it. *id.*
3. Where the agreement is to convey land in fee simple, a judgment against the vendor, will not, at law, authorize the vendee to rescind the contract. A conveyance without covenants would satisfy such an agreement. *id.*
4. The practice of *English* conveyancers in executing a contract to convey land. *id.* 18, note (b)
4. *H.* and others, became sureties for *B.*, a deputy sheriff, to *A.*, the sheriff; and then *A.* promised *H.*, that if he would become surety for him, *A.*, as sheriff, he would indemnify *H.* against his suretyship for *B.* *H.* accordingly became surety for *A.* *A.* was afterwards sued for *B.*'s wrongfully taking the goods of one, on a *fi. fa.* against another; and *H.*, and his co-sureties for *B.*, with *A.*'s knowledge, defended the suit, brought a writ of error, and reversed one judgment

contract; he having an interest in them, and a right to detain and sell them pursuant to the contract. *id.*

17. *Held*, also, that the contract was not usurious. *id.*

See ACTION OF ASSUMPSIT. ACTION OF COVENANT. ACTION FOR MONEY HAD AND RECEIVED, 1, 2, 3, 4, 5, 9. MAINTENANCE.

AMENDMENT.

1. Leave to amend a declaration in ejectment, by adding a new demise, will not be given on a mere notice of motion, without any cause shown by affidavit. *Jackson v. Smith*, 39
2. Where, on a judgment by default, on a declaration upon a promissory note, with the money counts, the plaintiff had caused the damages to be assessed by the clerk, and taken final judgment, without entering a *nolle prosequi* as to the money counts; on a motion to set aside the judgment and subsequent proceedings, he was allowed to amend, on payment of costs, by then entering a *nolle prosequi*; and the motion to set aside the judgment was denied. *Seeber v. Yates*, 40
3. Execution amended as to the return day. *Vandusen v. Brooker*, 50
4. The plaintiff, by mistake, proceeded against heirs and devisees, as *joint debtors*, within 1 R. L. 521, s. 13; the process being served on some of the defendants; against whom the plaintiff declared. The defendants served with process, demurred; upon which the parties agreed that judgment should be entered against the plaintiff on demurrer, with leave to amend on payment of costs, as if the cause had been argued and decided for the defendants on the demurrer; *held*, that the plaintiff might then bring in the other defendants on *simul cum process*; and declare and proceed against the whole. *Thomas v. Van Ness*, 588
5. Declaration in ejectment amended by altering the time of demise; though the cause had been twice noticed for trial; and an objection taken on the trial, that the time was laid too early; and a bill of exceptions signed on this point. *Jackson v. Tuttle*, 590
6. Amendment granted on paying the costs of the motion. *id.*
7. Plea amended after replication, demurrer, joinder in demurrer, judgment in supreme court for defendant, on the ground that the replication was bad and plea good; writ of error to the court of errors and rever-

sal, because plea was bad. But this was on paying the costs of both courts. *Utica Ins. Co. v. Scott*, 606

8. The supreme court considered the case the same as if the plea had been overruled in that court on the demurrer. *id.*
9. That court will allow a plea, holden bad on demurrer to the replication, to be amended, though the plea set up an unconscionable defence. *id.*
10. But they will not allow a new plea to be added, setting up a new defence which is unconscionable. *id.*

See ATTACHMENT, 2. CASE, 1. ERROR. PLEAS AND PLEADING, 24, 25, 26, 28, 29. PRACTICE, 3. REPLEVIN, 2, 5, 6.

APPEAL.

See APPEAL FROM A JUSTICE'S COURT. APPEAL TO THE GENERAL SESSIONS.

APPEAL BOND.

See APPEAL FROM A JUSTICE'S COURT, 2, 3, 6, 10, 16.

APPEAL TO THE GENERAL SESSIONS.

On appeal to the sessions, from an order of removal of a pauper, the order is no evidence of the facts it contains; but the respondents are bound to begin *de novo*; and make out their case independent of the order. *Olsego v. Smithfield*, 760

APPEAL FROM A JUSTICE'S COURT.

1. An appeal lies from the judgment of a justice in favor of the plaintiff, where an issue is joined; though the defendant do not appear, and take no part in the trial. *Ex parte Stafford*, 44
2. An appeal bond executed in blank, and delivered to an agent, to fill up and make perfect, cannot be altered by him, after he has filled the blanks, and delivered the bond to the justice. *Ex parte Decker*, 59
3. Whether a parol power to fill the blanks and perfect the bond, was valid? *Quere. id.*
4. To warrant an appeal from a justice's court, the costs must be actually paid. *Ex parte La Farge*, 61
5. It is not in the power of the justice to waive the payment, by charging them in account against the party. *id.*

3. The sheriff is liable to an attachment for not returning process pursuant to a rule ; though it never came to his own hands ; but only to the hands of his deputy. *id.*

4. An attachment for not performing an award on the submission being made a rule of court, cannot go till the rule be served and performance demanded. *Ex parte Wallis*, 581

Vide ATTORNEY, 8. ERROR, WRIT OF, 1.

ATTORNEY.

1. An attorney may discontinue a suit, in virtue of his general power as attorney on record. *Gaillard v. Smart*, 385

2. The attorney for the plaintiffs told the attorney for the defendant, that the cause was discontinued ; and being requested by the latter to enter a rule to discontinue, said this was not necessary ; and in consequence, the defendant, with the consent of his special bail, went to *Europe* ; whereupon, no rule being entered, the plaintiffs afterwards proceeded with the cause. On motion, the court ordered a discontinuance to be entered. *id.*

3. An indictment against an attorney, &c. upon the statute, (*sess. 41, ch. 259, s. 1.*) for buying a note, need not allege that he bought the note with intent to prosecute, &c. ; nor that the note has been prosecuted ; nor need it show when it became due, its amount, or other circumstance, from which an intent to prosecute is to be inferred. *People v. Walbridge*, 512

4. The act of buying is the offence, unless it come within the *proviso* of the statute ; which it lies with the defendant to show. *id.*

5. The statute is constitutional. *id.*

6. The indictment upon it may conclude, contrary to the form of the statute, in the singular. It need not to be contrary to the form of the statutes. *id.*

7. The omission, in reciting the title, of the word *the*, after the practice of, will not vitiate the indictment. *id.*

8. Money collected by an attorney for his client, must be demanded before the client can move for an attachment for its non payment. *Ex parte Ferguson*, 596

Vide BAIL, 2. CERTIORARI, 6.

AUTHORITY.

1. A power of attorney to add one's name, as surety to a pre-existing note, describing the note correctly as to the parties, the sum, and the time when payable, though it omit to mention that the note bears interest before due, is sufficient to sustain a verdict upon it against the one whose name was put there under the power. *Cape Fear Bank v. Gomez*, 435

2. The question whether the particular note was intended, is one of identity ; and may properly be submitted for determination, to the jury. *id.*

Vide PARTNERS AND PARTNERSHIP, 11, 12. PRINCIPAL AND AGENT.

AWARD.

Vide ARBITRAMENT AND AWARD. ATTACHMENT, 4. EVIDENCE, 16.

B

BAIL.

1. A plea served before special bail is perfected, in a bailable action, is a nullity ; and does not become good by a subsequent justification ; unless it was received *de bene esse* ; and notice of this given to the defendant. *Adams v. Minton*, 58

2. The plaintiff has a right to act on a notice of bail, received from an attorney of this court ; though he may not have been retained ; and though bail may not be in as stated in the notice. *Cobb v. Darrow*, 390

3. Proceedings will be stayed against special bail, pending a writ of error brought by the principal. *Wheeler v. Raymond*, 582

4. Though a defendant be discharged under the insolvent act, if he have time to plead the discharge, but omit to do so, an exoneretur will not, after judgment, be ordered in favor of his special bail, on account of the discharge. *Campbell v. Palmer*, 596

5. They must surrender in the ordinary way. *id.*

6. Special bail will not be discharged, because their principal is imprisoned on conviction for a crime, unless it be for life ; or for a long term in another state. *Phenix Fire Ins. Co. v. Mowatt*, 599

7. The plaintiff is not bound to know that special bail is in, unless the defendant give regular notice thereof ; and may, therefore,

CANAL BOAT.

See CANALS, 3, 4, 5, 6, 7.

CANAL COMMISSIONERS.

See CANALS, 1, 2.

CANALS.

1. The canal commissioners have no right to levy a toll upon *passengers* on the *Erie* and *Champlain* canals, within the *stat. sess.* 43, *ch.* 202, *s.* 17 & 20. *Myers v. Foster*, 567
2. But the act was amended, and extended to *persons*, by the statute of *April 12th, 1827*. *Vid. note (a)* at the end of this case. *id.*
3. In passing on the *Erie* and *Champlain* canals, freight boats are bound to afford every facility for the passage of packet boats, as well through the locks, as elsewhere on the canal. And where a freight boat, passing west on the *Erie Canal* was waiting for the emptying of a lock, when a packet boat overtook her, *held*, that the packet boat should pass first. *Farnsworth v. Groot*, 698
4. On request, the master of the freight boat refusing to consent to this, the master of the packet may use all necessary means to obtain the preference due to him, short of a breach of the peace; as by pulling back the freight boat and forcing his own forward; for which no action of trespass will lie; no unnecessary damage to the freight boat being done. *id.*
5. If the freight boat be detained or injured through the obstinate resistance of the master, to the exercise of the right of preference of the packet; this is the fault of the former, for which he cannot recover damages, against the master of the latter. *id.*
6. What will constitute a delivery of goods to the master of a canal boat, so as to make him accountable in trover. *Packard v. Gelman*, 757
7. If it be a sufficient delivery, according to the usages of business, to leave them on the dock by or near the boat; yet this must be accompanied with express notice to the master. *id.*

See RIVERS AND CREEKS, 5, 6, 7, 8.

CASE.

1. The supreme court will not order a case to be referred to a circuit judge for settlement as to the evidence, where it has once been settled by him according to the practice of the court; unless there be a very plain mistake. *Jackson v. Miller*, 38

2. Counsel have a right to be heard on settling a case before a judge. *Root v. King*, 569

3. A judge has a right to correct his charge as presented by a case, even though the parties may have agreed upon it. *id.*

4. The court, on a verdict subject to their opinion upon a case, may draw the same inferences as, in their opinion, a jury would be warranted in drawing from the facts in the case. *Jackson v. Whitbeck*, 632

CASES OVERRULED, EXPLAINED OR DOUBTED.

Chambers v. Jones, (11 *East*, 405,) overruled. *Middle Dist. Bank v. Deyo*, 732

Griffiths v. Eyles, (11 *East*, 405,) overruled. *id.*

Ruan v. Perry, (3 *Caines' Rep.* 120,) explained. *Fowler v. The Aetna Fire Ins. Co.* 673

Wara v. Haydon & Ventom, (2 *Esp. Rep.* 552,) overruled. *Bohun v. Taylor*, 313

CERTIFICATE OF A JUSTICE.

See EVIDENCE, 11, 12.

CERTIORARI.

1. Cause must be shown for a certiorari, in all cases where it is to review the proceedings of an inferior jurisdiction for error; except where the writ is sued out by the people. *Munro v. Baker*, 396
2. A certiorari removes the record only. *Ex parte Vermilyea, cor. Woodworth, J. Vacation*, 555
3. In criminal cases, doubts upon the admission, or legal effect of testimony, cannot be brought before a superior court by certiorari, or writ of error. *id.*
4. But a challenge for principal cause, forms a part of the record; and to review this, a certiorari will lie in a criminal cause; and a writ of error in a civil cause. *id.*
5. Otherwise of a challenge to the favor. *id.*
6. The affidavit to obtain the allowance of a certiorari, may be taken before the attorney who commences the suit. *Vary v. Godfrey*, 587

CHALLENGE OF A JUROR.

1. A challenge for principal cause may be demurred to, or issue may be taken upon it.

COMMISSIONERS OF INSPECTION.

Vide TURNPIKE COMPANY, 3, 4.

COMMISSION TO EXAMINE WITNESSES.

1. The interrogatories under a commission to examine witnesses, issued pursuant to the act, (*sess.* 36, *ch.* 56, *s.* 11, 1 *R. L.* 519, 20,) may be signed by counsel, without the addition of his character to the signature. It is enough that he is, in truth, a counselor. *Homer v. Martin*, 156
2. A judge of the C. P. of the degree of counsel in the supreme court, may direct as to the return of a commission, within the act, (*sess.* 45, *ch.* 217, *sec.* 2.) *id.*
3. So the first judge of the C. P. of *New-York*. *id.*
4. Form of the direction. *id.*
5. A direction to return the commission by mail, directed to one of the clerks of the supreme court, is complied with, if the commission be delivered from the post office to the clerk, by any of the ordinary means; as by a messenger, the penny post, &c. Nor is it any objection, that it be delivered by the attorney for one of the parties. The true question is, was it delivered to the clerk in an unaltered state? If the court be satisfied there has been no abuse, it may be received in evidence. *id.*
6. An affidavit for a commission, must show that issue is joined in the cause; or some reason for applying before. *Allen v. Hendree*, 400
7. Answers to interrogatories upon a commission, cannot be objected to at the trial, as incompetent evidence, provided they are fairly within the scope of the interrogatories. *Francis v. The Ocean Ins. Co.*, 404
8. The proper time to object, is when the interrogatories are settled. *id.*
9. But the answers must be restrained in their effect, to matters of fact; and cannot be received to establish a matter of law; as where a master of a vessel answered that the voyage was fair and lawful, &c. This was held inadmissible, beyond showing the *bona fides* with which he acted. *id.*
10. A deed, or other exhibit, proved under a commission, must, in general, be annexed to, and returned with the commission. *Jackson v. Shepherd*, 414
11. But where it is in the custody of the law; e. g. being a deed of a military lot, deposited

with the clerk of the county of *Cayuga*, and forming part of the records of that county; annexing a copy is sufficient, and the exhibit may be produced on the trial, separate from the commission. *id.*

COMMON CARRIER.

1. The master or owners of a vessel transporting goods on the high seas, are not common carriers, within the meaning of the rule, subjecting the latter to all losses or injuries, which arise from any other cause than the act of God, or the enemies of the country. And in an action against the master or owners, for loss or damage of goods from any other cause, it should be submitted to the jury, upon the evidence, whether they used ordinary care and diligence. *Aymar v. Astor*, 266
2. Either case or trover may be brought against a carrier, for the non-delivery of goods; but in the latter action, a conversion must be proved. *Packard v. Getman*, 757

COMMON SCHOOLS.

1. The penalty imposed by the latter part of the 22d section of the act for the support of common schools, (*sess.* 42, *ch.* 161,) upon the clerks, &c. of school districts, for the non-performance of their duties, does not extend to the defective performance, or omission of a particular act; but only to a general non-performance of the duties of their offices. *Spafford v. Hood*, 478
2. Accordingly, it does not attach for the omission of the clerk, to warn a part of the taxable inhabitants of a school district, to attend a special meeting ordered by the trustees. *id.*
3. The object of this section was, to compel a *bona fide* acceptance of the offices which it enumerates.
4. A similar construction applies to the fifth section of the act for the assessment and collection of taxes, (2 *R. L.* 512,) which imposes a penalty upon assessors. Per *Sutherland, J.* delivering the opinion of the court. *id.*
5. Where it is the intention of the legislature to impose a penalty on an officer, for the omission of any particular duty, they use language which is clear and explicit; e. g. 2 *R. L.* 274, imposing \$10 on overseers of highways, for not warning people assessed to work, &c. Per *Sutherland, J.* delivering the opinion of the court. *id.*

COMPUTATION OF TIME.

See TIME.

6. The statute (*sess.* 41, *ch.* 259, *s.* 6,) regulating the costs in several suits on the same note, &c. applies to the general, not the interlocutory costs of the cause; e. g. the costs of putting off a cause at the circuit. *Ontario Bank v. Baxter*, 395

7. Where several suits are brought against the maker and endorsers of a note, an affidavit of merits to set aside an inquest in all the causes, may be made by the maker; he being acquainted with the facts, and the defence being the same in all the causes. *id.*

8. On judgment against a party demurring, with leave to withdraw the demurrer and plead, on payment of costs, he must seek the opposite attorney and tender him the costs; or offer to pay on their being taxed; and this is a condition precedent to pleading. *Sands v. Mc Clelan*, 582

See APPEAL FROM A JUSTICE'S COURT, 4, 5, 7, 12, 13, 14, 15. ATTACHMENT, 1. EXECUTORS AND ADMINISTRATORS. PLEAS AND PLEADING, 26. REFERENCE, 2, 3.

COURTS OF GENERAL SESSIONS.

See APPEAL TO THE GENERAL SESSIONS.

COURTS OF JUSTICES OF THE PEACE.

Where the defendant in a justice's court, pleads title to an action of trespass *quare clausum fregit*, he is bound to abide by his plea, on the same action being brought in the C. P. though the action in the C. P. be not commenced at or before the term of the C. P. next after the plea is interposed in the justice's court. *Ex parte Drew*, 610

Vide APPEAL FROM A JUSTICE'S COURT. EXTORTION, 1, 5. SET-OFF, 2.

COVENANT.

Vide ACTION OF ASSUMPSIT, 11. ACTION OF COVENANT. WARRANTY, 3.

CROSS-EXAMINATION.

See EVIDENCE, 24.

D

DAMAGES.

See ACTION OF COVENANT, 9, 10. ACTION OF TRESPASS, 2, 3. AMENDMENT, 2. LIMITATIONS, STATUTE OF, 4, 5. MARRIAGE PROMISE, 3, 4. PRACTICE, 1. RIVERS AND CREEKS, 5, 6, 7, 8.

DEBT.

See ACTION OF DEBT.

DEBTOR AND CREDITOR.

See FRAUDULENT JUDGMENT AND EXECUTION.

DEBTORS ABSCONDING OR ABSENT.

A foreign creditor cannot proceed here under the absent and absconding debtor act, (1 R. L. 157,) against a debtor residing abroad; the debt not being contracted within this state. *Ex parte Schroeder*, 603

DECUIT.

See ACTION OF ASSUMPSIT, 1, 2.

DECLARATION OF TRUST.

See TRUST, 1, 2.

DECREE.

Vide SURROGATE, 1, 2, 3, 4, 9.

DEED.

1. It is essential to the validity of a deed, that it should be delivered and accepted. *Jackson v. Richards*, 617

2. But the fact of non-acceptance cannot be shown by the written declaration of the grantee; especially where third persons are interested in maintaining or defeating the deed. It must be proved, like any other fact, by disinterested witnesses under oath. *id.*

Vide ACTION OF COVENANT, 5, 6, 11, 12. DISCLAIMER, 4, 5. GRANT. MILITARY LOTS. PATENT OF LANDS. WARRANTY, 1, 2.

DEFAULT.

Vide INQUEST BY DEFAULT.

DEMURRER.

Vide CHALLENGE OF A JUROR. PLEAS AND PLEADING, 22.

DETINUE.

See PARTNERS AND PARTNERSHIP, 3.

- and bounded on an arm of the sea, where the tide ebbs and flows, on one part; and the trustees of the town of *H.* in this state, lying on the opposite side of the arm, of the other part; which award established certain boundaries between the parties, and decided that certain fishing ground lay within the boundaries of *L.* In trespass by the lessee of a part of the fishing ground, who claimed a right of several fishery therein by prescription, against an inhabitant of *H.*, for taking fish on the demised premises; the latter justifying on the ground that the fishery was free to any citizen of this state; the plaintiff offered the award in evidence. *Held*, that it should not be received; that it determined nothing as to the rights claimed by the respective parties; and was therefore immaterial. *Gould v. James*, 369
17. Proof that a ship's papers were seized with her, and delivered into the court where she was condemned; but that a certain paper belonging to her, could not be found there on search, is sufficient evidence of loss, to warrant parol evidence of its contents. *Francis v. The Ocean Ins. Co.*, 404
18. One issue was, on the sufficiency of *G.*'s property to satisfy a certain judgment and execution. *Held*, that the amount of previous incumbrances on the same property, was within the issue, and might be inquired of on the trial. *Norris v. Badger*, 449
19. The party interested to show the insufficiency of the property, was allowed to give parol evidence of judgments, &c. on cross-examining a witness introduced by the opposite party, though the latter objected to this, and excepted, taking a bill of exceptions. The same bill stated, that previous incumbrances, sufficient to reduce the value of the property to nothing, were afterwards duly proved by documental evidence. *Held*, on motion for a new trial, that though the parol evidence was improper, a new trial should not be granted; that the jury could not have been misled by that evidence; that, by the party going into documental evidence, he waived that by parol; and, therefore, no error. *id.*
20. *Semb.* it would be otherwise, where the parol evidence might possibly have misled the jury, and had not been waived. *id.*
21. In general, where a party is charged with a specific fraud in a civil action, his character is not in issue. The evidence of fraud cannot be repelled, therefore, by proving his general good character for integrity. *Fowler v. The Aetna Fire Ins. Co.*, 673
22. The case of *Ruen v. Perry*, (3 *Caines*, 120,) was an exception to this rule, being a charge of gross depravity and fraud upon circumstances merely. *id.*
23. Where the testimony before a jury is contradictory, and the character and credit of witnesses are in question, a new trial will not be granted, on the ground that the verdict is against the weight of evidence. *Winchell v. Latham*, 682
24. Where a witness is introduced by a party, and is interrogated as to a particular fact, and the opposite party, on cross-examination, asks him generally, if he ever communicated that fact to any one, and to whom? and he answers that he communicated it to the party calling him; this does not entitle the party calling him to pursue the inquiry as to his own reply, and other conversation with the witness at the time of the communication. Otherwise, if the witness be asked, on cross-examination, specifically, whether he made the communication to the party calling him. *id.*
25. Where the maker, the defendant, sought to impeach a note, by showing the want of a valuable consideration; and the plaintiff answered by proving a pecuniary consideration; and the defendant replied by evidence of the plaintiff's declarations, that the consideration was not pecuniary, but the note was given upon a special agreement between the parties; *held*, that it should not be left to the jury, to say whether the note was not sustained by the consideration stated in the plaintiff's declarations, as proved by the defendant. *id.*
26. A plaintiff cannot go to a jury upon two distinct and inconsistent propositions proved by himself, or established by his own proof, in connexion with his declarations as proved by the defendant. *id.*
27. A former recovery is not admissible evidence under the general issue, in an action of trespass; e. g. an action of assault and battery. *Coles v. Carter*, 691
28. Whether it is otherwise in an action on the case, or assumpsit? *Quere.* *id.*
29. A book purporting to contain the proceedings of the commissioners of forfeitures; but not proved ever to have been in their possession, though found in the clerk's office in 1806, and having lain 17 years there, is not admissible in evidence to show a sale by the commissioners; nor will a conveyance be presumed, where such a book is shown to be genuine, unless the

EXTINGUISHMENT.

Vide DOWER. ESCAPE, 8.

EXTORTION.

1. Where a defendant appeared before a justice, on a summons returnable at 10 A. M.; and waited till about 12 o'clock, when the justice told him, he (the justice,) must tax the plaintiff with the costs, upon which the defendant departed; but the justice afterwards adjourned the cause to another day; and gave judgment as upon the summons, with 3 or 4 dollars costs; and the defendant afterwards paid to the justice the amount of the note on which the suit was brought; and the justice demanded the costs; which the defendant refused to pay in full; but paid the justice 12 1-2 cents; *held*, that this was extortion in the justice, for which he might be indicted and punished criminally. *People v. Whaley*, 661
2. *Held* also, that the motives of the justice, as whether corrupt, or whether he acted through a mistake of the law, were a proper question for the jury. *id.*
3. *Held*, that he had a right to receive the money on the note, as the agent of the plaintiff; but the extortion lay in receiving the 12 1-2 cents under pretence of the judgment. *id.*
4. Extortion is the taking of money by any officer by color of his office, either where none at all is due, or not so much due, or when it is not yet due. *id.*
5. When a cause is discontinued before a justice, by the laches of a plaintiff, the justice has no jurisdiction; and if he proceeds in it, his proceedings are *coram non judice*, and void. *id.*
6. Extortion may be laid generally, in an indictment, by *color of office*. *id.*

F

FACTOR.

1. The sale of several parcels of goods by a factor, belonging to several of his principals respectively, on a credit, to one person, and taking one note from the vendee for the whole, payable to himself, will not, *per se*, render him liable to his principals. *Corties v. Widdifield*, 181
2. The note does not extinguish the demand, for goods sold, but leaves each principal to his usual remedy. *id.*
3. Nor will the factor's giving up the note, and taking others, payable earlier, or at the same time with the first, render him liable, provided he still retain the name of the vendee, either as maker or endorser. *id.*
4. A factor advancing money, and having goods in his hands, is not confined in his remedy for his advances, to the mere fund deposited, but gives a joint credit to the fund and the person of his principal. Yet, from the nature of the contract, resort must first be had to the fund, if it can be made available. *id.*
5. Where a factor sold the goods of his principal, and took a bond to himself for the amount, including a debt of his own, *held*, by the U. C. C. that he was liable to his principal as for money had and received, though nothing was in fact received. *Jackson v. Baker, note (a)*, 183

Vide CONSIGNOR AND CONSIGNEE.

FALSE AFFIRMATION AS TO THE CREDIT OF A THIRD PERSON.

Vide ACTION OF ASSUMPSIT, 1, 2.

FALSE IMPRISONMENT.

See PROCESS, 2.

FEIGNED ISSUE.

1. The supreme court will not, in general, hear a motion for a new trial, on a case made upon the trial of a feigned issue ordered by a circuit court of equity. *Doe v. Roe*, 55
2. The proper course is, to move in the court which ordered the issue. *id.*

FELONY.

Vide LARCENY.

FISHERY.

1. One may prescribe for an exclusive right of fishery in an arm of the sea, where the tide ebbs and flows. But such prescription must be clearly proved. Every presumption is against it. *Gould v. James*, 369
2. A several fishery, in an arm of the sea, where the tide ebbs and flows, may be derived from a grant or prescription. *id.*

FIXTURES.

1. As between vendor and vendee of land, all fixtures pass to the latter, though they

2. But in such a case, where the master, without sufficient cause, refuses to repair his ship and send on the goods, and to procure other vessels for the purpose, the owner may immediately demand his goods; and shall be discharged from freight both full and *pro rata*. *id.*
3. To entitle to *pro rata* freight, the acceptance must be voluntary. *id.*
4. And where the master, having thus put into an intermediate port, at first refused to repair and proceed, and to procure other vessels and send on the goods, though one might have been done; and the owner negotiated several days with him, in order to induce him to do the one or the other; and, at last, the master made an offer to repair and proceed, under circumstances calculated to excite doubt of his sincerity; whereupon, the owner demanded and received the goods, and transported them in vessels of his own procuring; in an action for freight; *held*, that it should have been left to the jury to say whether the proposition to repair, &c. was made *bona fide*, and whether the acceptance was voluntary, so as to entitle the ship owner to *pro rata* freight. *id.*
- mere description; and quantity being the least certain part, must yield to boundaries, or the number of the lot, or other more certain description. *Jackson v. Moore*, 706
4. Effect should be given to every part of the description, if practicable. But if the thing to be granted, appear clearly from any part of the description; and other circumstances are mentioned, not applicable, the grant will not be defeated; but the false or mistaken part will be rejected. *id.*
5. What is most material and most certain, shall prevail over that which is less material and less certain. Thus, course and distance shall yield to natural and ascertained objects, as a river, a stream, a spring, or a marked tree. *id.*
6. Thus, where a conveyance was, of "two tracts or parcels of land, lying, &c., being township no. 3, &c., also, township no. 4, &c., to be 6 miles square; and containing 23040 acres each, and *no more*," &c., though these tracts were, in fact, 6 by 8 miles in size; *held*, that the whole 6 by 8 miles, passed. *id.*
7. Such a description is not ambiguous in a legal sense, so as to be a subject of elucidation from extrinsic evidence. *id.*
8. The acts of a portion of the grantees, tenants in common, in locating land under a deed, will not affect the co-tenants, unless it appear that they sanctioned these acts in some way. *id.*
9. And the court will not, in such a case, presume a grant, for the purpose of quieting ancient possessions. *id.*
10. A grant of land will never be presumed from lapse of time, unless it be so great as to create the belief that it was actually made; or, unless the facts and circumstances in the case show that the party to whom it is presumed to have been made, was legally, or equitably entitled to it. *id.*
11. Of the description of parcels in a grant; with the English rules of construction. *Note (a)*, 720 to 722

G

GENERAL SHIP.

See MASTER AND OWNER, 5.

GOODS.

See SALE OF GOODS.

GRANT.

1. An exception of a mill site, in a grant or lease, operates as an exception of the soil of the mill site; and so much land as is necessary for the mill pond, and for erecting and carrying on the business of a mill. *Jackson v. Vermilyea*, 677
2. It is not the reservation of a mere easement; but of the soil itself; and the grantor or lessor, or his assigns, may enter upon and locate under the exception, even after the grantee, or lessee, has conveyed, or assigned, or mortgaged his interest to another. *id.*
3. In the description of parcels in a conveyance of land by boundaries, or number of the lot, or other certain designation, the quantity being mentioned in the addition, without an express covenant that the land contains that quantity, the whole is considered as

See FISHERY, 2.

GRANTOR AND GRANTEE.

See GRANT, 8.

GUARDIAN AD LITEM.

See INFANT, 1, 2.

2. An insolvent discharge, under the act of 1913, is constitutional as to debts contracted after the act. *id.*

See BAIL, 4, 5. CHECK, 5.

INSPECTION OF BOOKS.

See EVIDENCE, 1, 2, 3.

INSURANCE.

1. In an action on a policy of insurance upon a cargo, the underwriters may show in their defence, that the vessel had not a competent crew, or a captain or pilot of competent skill. But this is a question of fact to be submitted to a jury, upon the nature of the voyage, &c. *Treadwell v. The Union Ins. Co.*, 270
2. If the vessel become disabled, in such case, the underwriters have a right to claim that the master should procure another vessel to forward the cargo, if in his power. *id.*
3. The rule on this subject is, that if there be a vessel in the port of distress, or in a contiguous port, the master should procure it. *id.*
4. But where it appeared that resort must have been had to distant places; and, independent of procuring a vessel, there were further serious impediments in the way of putting the cargo on board; *held*, that the rule was not obligatory. *id.*
5. A cargo was insured at and from *North Carolina to New-York*; *held*, that if the vessel was sea-worthy when she passed the boundary line of *North Carolina*, this was sufficient; and her unsea-worthiness previous to that point of time, would be no defence in an action against the underwriters for a loss. *id.*
6. The owner of the cargo, without request from the owner of the vessel, repaired her on the voyage; and effected an insurance in his own name, on his expenditures for repairs. *Held*, that he had not an insurable interest; that the repairs being voluntarily bestowed, belonged to the vessel; and the property of them vested in the owner. *Buchanan v. The Ocean Ins. Co.*, 318
7. The insurance was by a wagering policy, and against total loss only. The owner of the vessel had previously insured her; and after she had arrived at her port of destination, she was abandoned as for a technical total loss, by the owner, to his underwriters; and sold with their consent, and for their account. The owner of the cargo, who had made the repairs, then abandoned to his underwriters. *Held*, that this was not such a total loss as came within the policy; that a constructive total loss of the subject was not enough. But the loss must be absolutely and finally total. *id.*
8. The provision in a policy of insurance that the risk is against total loss only, means an absolute, not a mere technical total loss, whether the policy be a wagering policy or not. *id.*
9. A declaration on a policy of insurance upon a vessel, need not aver any interest in the assured; and if interest be averred, this may be rejected as surplusage. *id.*
10. If it be the duty of the master, or supercargo, in behalf of the assured, to appear and put in a claim to a vessel insured, and improperly seized under pretence of carrying on illicit trade, (of which *quere*.) the omission of this duty may be excused by irregularity in the court where the suit is pending; as where process of monition is returnable at one place, and the cause heard, and the vessel condemned at another, unknown to the supercargo. *Francis v. The Ocean Ins. Co.*, 404
11. The assured, in a policy upon a ship, who sustains a total loss by seizure, &c. is entitled to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship, on condemnation and sale. *id.*
12. In an action on a policy of insurance upon a ship, it appeared that when the underwriters were applied to for payment for a total loss, they replied that they would not settle the claim in any way. *Held*, that this was a waiver of preliminary proof of interest in the assured. *id.*
13. Construction of the clause in a policy of insurance against loss by fire, providing for only a rateable payment, in case of other policies on the same subject. *Lucas v. Jeff. Ins. Co.*, 635
14. Where there are several policies containing this clause, they are all, and each, liable to pay the rateable portion mentioned in the clause, though it happen that some have paid more than their share; and even enough to cover the whole loss, and this, whether they had knowledge of all the policies at the time or not. *id.*
15. There is no contribution between policies containing this clause. *id.*
16. Where, however, there are several policies, and one only contains this clause, and the others pay to the extent of their sub-

JURORS.

The statute relative to balloting for jurors, (*sess.* 49, *ch.* 309, *s.* 4,) is merely directory; and though it be violated, this is no ground for moving to set aside the verdict, unless the irregularity be objected to at the time, or there be some abuse or injury to the party moving. *Cole v. Perry*, 584

See AFFIDAVIT. CERTIORARI, 4, 5. CHALLENGE OF A JUROR. TURNPIKE COMPANY, 1, 2.

JUSTICE OF THE PEACE.

1. The legislature have no power to shorten the constitutional term of office of a justice of the peace. *People v. Garey*, 642
2. This cannot be done indirectly, by the erection or division of counties. *id.*
3. Where a town is transferred from one county to another, or a new county made out of several towns, the justices of these towns continue to hold their offices, as justices of the town or towns in the new counties. *id.*
4. The legislature have power to enlarge or contract the territorial jurisdiction of justices of the peace. *id.*
5. The office of justice of the peace is, under the new constitution and the statute which it adopts, (*sess.* 41, *ch.* 60, *s.* 2,) a town office, though it has county powers. *id.*
6. The appointment of more than four justices in a town would be void. *id.*

See APPEAL FROM A JUSTICE'S COURT. COURTS OF JUSTICES OF THE PEACE. EVIDENCE, 11, 12. EXTORTION.

L

LANDLORD AND TENANT.

1. An action does not lie on the statute, (1 *R. L.* 436, *s.* 9,) for double value of goods, &c. for distraining for more rent than is due, or for distraining for rent for which there is no right to distrain; but only for distraining where *no rent* whatever is due. If there be any, the least rent due, it protects the distrainer, though he may be liable in some other form. *Peters v. Newkirk*, 103
2. Where a lease is surrendered as to part of the premises, the right to distrain continues as to the residue. *id.*
3. Where rent is agreed to be paid at the end of the year; but before that time the tenant

surrenders part of the premises; giving a due bill for the rent, payable presently; *held*, that the landlord may distrain for the rent immediately. *id.*

4. Rent may be payable in advance, and may, in such case, be distrained for when due. *id.*
5. A tenant cannot recover of his landlord, for repairs done by the former to the demised premises, unless there be a special agreement by the latter to pay for them. *Mumford v. Brown*, 475
6. Though a tender of rent is good on the land; yet a personal tender is also good off the land. *Hunter v. Le Conte*, 728
7. A personal tender before distress, makes it tortious; and such tender afterwards, and before impounding, makes the detainer unlawful; but tender, after impounding, makes neither the one nor the other unlawful. *id.*
8. In replevin, a plea of tender, to an avowry or cognizance, need not say *tout temps prist*; nor make a proffer of the money in court. *id.*
9. A tender of rent takes away a right to distrain, till a subsequent demand and refusal. *id.*
10. But a tender does not take away the right to sue for the rent as for a debt. It only saves interest and costs. *id.*
11. A tender of rent makes a distress wrongful, though the tender be not made till after the rent day. *id.*
12. But if costs have been incurred by the landlord, as if he have drawn a warrant of distress, or, in the city of *New-York*, made and filed the necessary affidavit, these costs must also be tendered, or the distress will be lawful. *id.*

13. The affidavit of rent due, in the city of *New-York*, required by the statute, (*sess.* 38, *ch.* 153,) to be made and filed, before distress, is, *prima facie*, sufficient, though the *jurat* be subscribed simply with the name of the officer before whom it is taken, without the addition of his title of office. *id.*
14. Where *A's* tenant from year to year takes a lease from *B*, the act is void; and cannot work an adverse possession against *A*. *Jackson v. Miller*, 751

See ACTION OF COVENANT, 3, 4. EJECTMENT, 3, 6. FIXTURES, 3.

LARCENY.

It is felony for a man who elopes with another's wife, to take his goods, though with

5. *Semble*, it would be otherwise as to the mere amount of damages, if he had had notice ; but still that he must have been sued within 6 years from his omission. *id.*
6. To save the statute of limitations, on the ground of unexecuted process, within the six years, the plaintiff must reply, that process was sued out, and returned *non est interitus* ; and connect it, by continuances, with the immediate process on which the defendant was arrested. And this replication must be sustained by evidence. *Baskins v. Wilson*, 471
7. It is not enough to show that process was sued out, without being delivered to the sheriff, or returned. *id.*
8. The continuances may be entered at any time. *id.*
9. An endorser is an incompetent witness for the endorsee in a suit by him against the maker, even to prove the defendant's confession of the debt, so as to take it out of the statute of limitations, after the maker's signing has been proved by another. And where the endorsee deposed that he had disposed of all his interest in the note ; and believed that he had not been made responsible ; *held*, that this was not sufficient to do away the presumption of law that he was interested. *id.*
10. But, *semble*, that if he be not responsible as endorser, he would not be so far interested, by reason of an implied warranty of the genuineness of the note, as to preclude his being a witness to show the maker's confession, so as to take the note out of the statute of limitations, after the maker's signature had been proved by another. *id.*

Vide ACTION FOR MONEY HAD AND RECEIVED, 5. AGREEMENT, 8.

LOST DEED.

Vide ACTION OF COVENANT, 5, 6.

M

MAINTENANCE.

1. An agreement to aid in defending a suit, with one who is not licensed as attorney or counsel, is illegal and void for maintenance. *Burt v. Place*, 431
2. And where B. sold and conveyed land to P., who was not of the legal profession, upon an agreement that the latter should pay part in specific articles, and part in defending a law suit before a justice ; *held*,

that the whole agreement was illegal and void ; and though the latter had sold the land, and received the money for it, the former could recover nothing. *id.*

MANDAMUS.

1. On motion for a mandamus, heading the affidavit, "Sup. court : In the matter of J. L. against the judges, &c." is not such an entitling as to prevent its being read. *Ex parte La Farge*, 61
2. Setting aside a judgment by default in a court of common pleas, is matter of discretion with that court ; and this court will not interfere on such a subject by mandamus. *Ex parte Bacon*, 392
3. Peremptory mandamus granted on motion ; the return to an alternative mandamus being insufficient. *The People v. Seymour*, 579

See OVERSEERS OF THE POOR, 2. RIVERS AND CREEKS, 5, 6, 7, 8.

MARRIAGE.

See MARRIAGE PROMISE.

MARRIAGE PROMISE.

1. A jury may infer mutual promises of marriage from the defendant's visits to the plaintiff, as a suitor, and his declarations that he had promised to marry the plaintiff. *Southard v. Rexford*, 254
2. After a defendant has once broken a promise of marriage, his offer to renew it, is no defence to an action for the breach. *id.*
3. In an action for breach of promise of marriage, if the defendant give notice, with his plea, that he will prove that the plaintiff has been guilty of fornication ; but fail entirely to show it on the trial, the jury may consider this in aggravation of damages. *id.*
4. The damages in this action are in the sound discretion of the jury, under the circumstances of each particular case. *id.*

MASTER OF CANAL BOAT.

See CANALS, 3, 4, 5, 6, 7.

MASTER AND OWNER.

1. The master of a vessel, when abroad, is the agent of the owners ; and has power to make contracts in relation to freight ; which are binding upon the owners. *Ward v. Green*, 173

NEGLIGENCE.

See ACTION. ELECTION OF ACTIONS. LIMITATIONS, STATUTE OF, 2, 3.

NEW TRIAL.

See ACTION OF COVENANT, 10. AFFIDAVIT. EVIDENCE, 23.

NEW-YORK, CITY OF.

1. If a master of a ship, or other vessel, arriving from a foreign country, or any other of the United States, who shall enter his vessel at the custom house in the city of New-York, suffer an alien passenger to land there, without giving, if required, pursuant to the statute, (*sess. 36, ch. 86, s. 252, 2 R. L. 441.*) such bond as is required by that section, or without such permission in writing as is required by that section, unless it be refused on demand, he incurs the penalty of \$500, mentioned in that section. *New-York v. Staples*, 169
2. The course to be pursued under the 251st and 252d sections of that act, as to an alien passenger, is, on report by the master, for the mayor or recorder to require a bond; when it must be given. If not required, or if required and given, the master must then demand a permission in writing from the mayor or recorder, to land his passenger; when, if it be granted or refused, he may land. But a permission, or demand and refusal, is essential to the right. A bond only, or neglect to demand one, is not enough. *id.*
3. The statute is not, in this respect, void as being contrary to the constitution of the United States. *id.*
4. After confirmation of the report of the commissioners of estimate and assessment, under the statute, (*1 R. L. 413, s. 178.*) there being no irregularity or surprise, the court will not open the matter, so that the merits may be considered, as to the wrongful assessment of an individual, even with the consent of the corporation. *Matter of, &c. Third-street*, 571
5. The supreme court act, under the statute, as commissioners; not as a court; and a report once regularly confirmed is irrevocable, unless all the parties in interest consent. *id.*

Vide SERVING PAPERS.

NIAGARA BANK.

1. Under the act incorporating the bank of Niagara, (*sess. 39, ch. 167.*) the bank did

not forfeit its charter by insolvency and closing their banking operations, if, before they were prosecuted by the people, they resumed the payment of their debts. *People v. Niagara Bank*, 196

2. Otherwise, if the prosecution had been commenced before they resumed payment. *id.*

3. The statute, (*sess. 48, ch. 325, s. 6.*) passed April 21, 1825, limited such insolvency to one year. If it exceed that term, the bank forfeits its charter. But this act does not extend to cases of forfeiture happening before it passed. *id.*

NOLLE PROSEQUI.

Vide AMENDMENT, 2.

NON PROS.

See REPLEVIN, 1, 3, 4.

NOTICE OF JUSTIFICATION.

See SLANDER, 16.

NOTICE TO QUIT.

See EJECTMENT, 3.

O

OBTAINING GOODS BY FALSE PRETENCES.

See FORGERY.

OFFICE HOURS.

Vide SERVING PAPERS.

ORDER TO FURNISH COPIES OF PAPERS, INSPECT BOOKS, &c.

Vide EVIDENCE, 1, 2, 3.

ORDER OF REMOVAL.

See APPEAL TO THE GENERAL SESSIONS.

ORIGINAL.

See VARIANCE BETWEEN ORIGINAL AND DECLARATION.

OVERSEERS OF HIGHWAYS.

Vide COMMON SCHOOLS, 5.

ed collaterally, in a suit between individuals, unless it issued without authority, or against the prohibition of a statute. *Jackson v. Marsh*, 281

2. Thus, where a patent issued in 1823, for lands which were occupied and improved, to the value of \$25, on the 17th of February, 1809; held, that it should be presumed that satisfactory proof was produced to the commissioners of the land office, that the occupant had been satisfied for his improvements previous to the date of the patent, pursuant to the statute, (1 R. L. 296, 7, s. 17.) *id.*

3. A patent was granted of subdivision No. 2; beginning at the south east corner of the survey 50 acres; and then giving courses and distances which would not include subdivision No. 2, but the whole, or greater part of subdivision No. 4; whereas, had it begun at the north east corner of the survey 50 acres, the same courses and distances would have included subdivision No. 2. The subdivisions had, before the grant, been surveyed, and a map made, and filed in the office of the surveyor general; according to which, subdivision No. 2 began at the north east corner of the survey 50 acres, whence the courses and distances mentioned in the patent, were laid down, and would include subdivision No. 2; held, that the word "south east" should be rejected as surplusage, and that the location upon the map should control. *id.*

4. If there are certain particulars sufficiently ascertained in the description of parcels, in a patent or deed, which designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the grant. *id.*

See RIVERS AND CREEKS, 1, 2, 4.

PAYMENT.

A delay of twenty years to demand the money, or bring a suit upon a contract under seal, will raise a presumption of payment; but this may be repelled, by showing that the covenantee died after the money fell due, leaving the contract in the hands of his attorney, who did not deliver it to the administrators, or place it within their control, till a number of years after the covenantee's death, it not appearing that they had any knowledge of the contract at the time of making out the inventory of their intestate's estate. *Jackson v. Hotchkiss*, 401

See ACTION FOR MONEY HAD AND RECEIVED, 8.

PENAL STATUTE.

See COMMON SCHOOLS. STATUTE.

PERJURY, EVIDENCE IN.

See SLANDER, 12, 13, 14.

PLEAS AND PLEADING.

1. In an action by the assignee of an order or draft not negotiable, in the name of the assignee against the acceptor, on an express promise by the latter to pay, it is proper to set forth all the circumstances which go to form the consideration of the order. *De Forest v. Frary*, 151

2. Where such an order is payable to two persons, for a debt due to them from the drawer, one alone cannot assign the order; they being tenants in common of the debt due on the order; and in declaring on an assignment by one, it must be shown that he was a partner with the other; or, in some other way, had authority to assign, or the declaration will be bad; and this, even though the draft be drawn, payable to the order of either of the payees. *id.*

3. An order payable on the sale of certain carriages, is not negotiable; as an inland bill of exchange; though it be, in terms, made payable to the order of the payee. *id.*

4. It seems, that in pleading an unsealed assignment of a chose in action, the consideration for such assignment must be set forth at large. It is not sufficient to aver, generally, that the assignment was for a valuable consideration paid by the assignee to the assignor. *id.*

5. Form of declaration in debt, against the sheriff, for suffering an escape from execution, on a surrogate's decree for distribution. *Dakin v. Hudson*, 221

6. Such a declaration must aver, that the surrogate's court which made the decree, granted the administration. *id.*

7. For, otherwise, it has no jurisdiction to decree distribution. *id.*

8. In pleading a proceeding of an inferior jurisdiction, the facts necessary to give it jurisdiction must be set forth, and then the pleader may say, *taliter processum fuit*. *id.*

9. The surrogate's court is a creature of the statute; and in pleading its decree, it must be shown affirmatively, that the facts upon which it acted, gave jurisdiction of the subject matter and the persons. *id.*

though objected to, being received in evidence; *held*, that there was no variance in describing the possession as *granted*; and that as to the allegation of the time when the rent became due, it not appearing that any injustice had been in fact done by the referees, the plaintiff might amend, even after a motion by the defendant to set aside the report of the referees on the ground of this variance, on payment of costs; and that the report should then be confirmed. *id.*

25. Whether such an amendment may be granted by a judge on the trial? *Quere. id.*

26. The amendment was granted by the court on paying the same costs as if it had been made on motion, previous to the cause being heard before the referees. *id.*

27. Declaration on a covenant, in articles of agreement, that the defendant, after the plaintiff had deducted what he owed the defendant, and what the plaintiff owed one S. if S. would transfer the debt, would pay the remainder of a sum of 1500 dollars, in 3 equal annual payments *from the date of the articles*. The covenant was, to pay the remainder of the 1500 dollars after the deductions; to be paid in *three equal annual payments*; without saying *from the date*. *Held*, no variance; the covenant meaning that the time should run *from the date*; and being, therefore, set forth according to its legal effect. *id.*

28. Clerical mistakes in the pleadings, may be amended, even after trial; where the party objecting to the mistake, will not be injured. *id.*

29. And the court have strongly inclined, that a single judge may allow the amendment at the trial. *id.*

30. A plea of *nul tiel record*, to a declaration on a judgment in a justice's court, is not triable by the record, but by jury; and may be joined with a plea of payment. *Witherwax v. Averill*, 589

31. A plea or notice of voluntary return before suit, in an action of escape against a sheriff, is within the statute, (1 R. L. 426, s. 23,) and must be supported by the defendant's affidavit that the escape was without his consent, privity, &c. *Gould v. Bruce*, 601

32. *Modo et forma* puts in issue matter of substance only. *Middle Dist. Bank v. Deyo*, 732

See ACTION OF ASSUMPSIT, 3. ACTION OF COVENANT, 5, 6. ACTION AGAINST HEIRS, 1, 2, 3. ACTION OF TRESPASS, 2. AGREEMENT, 4, 5, 6, 7, 8. AMENDMENT. ATTORNEY, 3, 4, 6, 7. BAIL, 1. BILL OF PARTICULARS. CHECK, 8. EJECTMENT, 1, 6, 8, 9. ESCAPE, 1, 2, 3, 4, 5, 6. INSURANCE, 9. LANDLORD AND TENANT, 8. LIMITATIONS, STATUTE OF, 6, 7. QUO WARRANTO, 1, 2, 3, 4, 8. SHAM PLEA. SLANDER, 11. WARRANTY, 2.

POLICY OF INSURANCE.

Vide CORPORATION, 5. FOREIGN SENTENCE. INSURANCE.

POOR.

See OVERSEERS OF THE POOR. SETTLEMENT.

POSSESSION.

See ADVERSE POSSESSION.

POWER.

See ATTORNEY, 1, 2. AUTHORITY.

POWER OF ATTORNEY.

See MILITARY LOTS.

PRACTICE.

1. In an action against several, if one pleads to issue, and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. *Van Schaick v. Trotter*, 599

2. The plaintiff cannot carry the cause down to trial, till a judgment by default is entered against the one who omits to plead. *id.*

3. Where a plaintiff inadvertently takes a judgment by default, without filing common bail, or causing the defendant's appearance to be entered, the court will allow either to be done on payment of costs; and if the omission be occasioned by the defendant's fault, then without costs. *id.*

4. A motion for such a rule as a party is entitled to, upon the ground that a copy of the case is not served upon him, according to the practice of the supreme court, must be noticed and brought on as a non-enumerated motion. *Wells v. Hatch*, 609

If it be irregular, the proper course is to move the court out of which it issued, to set it aside. *id.*

6. Superior courts, either of law or equity, will not interfere with each other's proceedings, on the ground of irregularity. *id.*

PROMISE.

See ACTION OF ASSUMPSIT. AGREEMENT.

PROMISE OF INDEMNITY.

See AGREEMENT, 4, 5, 6, 7, 8, 9.

PROMISE OF MARRIAGE.

See MARRIAGE PROMISE.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUTTING OFF TRIAL.

Vide PRACTICE OF CIRCUIT COURT.

Q

QUO WARRANTO.

1. Forms : Of information in nature of a *quo warranto* against an incorporated bank, for exercising banking privileges without warrant ; Of plea, setting forth its act of incorporation, and organization under it ; Of three several replications ; 1. That on, &c. the debts due by the bank, over and above the amount of their specie deposits, exceeded three times the sum of the capital stock subscribed and paid in ; *rejoinder and issue thereon* : 2. That they refused to redeem, &c. in specie, &c. ; and yet did not wholly discontinue their banking operations ; *rejoinder and issue thereon* : 3. That they became insolvent, by the fraud, neglect, or mismanagement of them, or of some or all of their officers or agents ; stopped payment, and discontinued and closed their banking operations, for several years. *Rejoinder* to the last replication, admitting its truth, but saying that the bank on, &c. resumed payment, and continued it ever since that time. Demurrer and joinder. *Held*, that the rejoinder was sufficient. *People v. Niagara Bank*, 196
2. An information in nature of a *quo warranto* against a corporation, for a forfeiture of its franchises, may be filed against it by its corporate name ; may charge it generally with usurpation ; and on the defendants setting forth the act of incorporation, and

justifying under it, the attorney general may reply the causes of forfeiture specially. Such a replication is not a departure. *id.*

3. An information, in nature of a *quo warranto* against an incorporated company, seeking to deprive it of its franchises, on the ground of forfeiture by nonuser, &c. may be against the company in its corporate name. *People v. Hudson Bank*, 217
4. The judgment is a judgment of seizure. *id.*
5. Corporate rights may be forfeited by non-user or misuser. *id.*
6. Suffering an act to be done which destroys the end and object for which a corporation was instituted, is equivalent to a surrender of its corporate rights. *id.*
7. As where an incorporated bank becomes insolvent ; and assigns so much of its property to trustees for the purpose of paying its debts, as to prevent its resumption of banking business. *id.*
8. And the attorney general may, on an information in nature of a *quo warranto*, reply such assignment in general terms ; without saying in particular how much was assigned, or its value ; or how much, or what value was necessary to disable the bank from resuming its operations. *id.*

Vide WASHINGTON AND WARREN BANK.

R

REAL ACTIONS.

Vide ACTION REAL.

RECAPTION ON FRESH SUIT.

Vide ESCAPE, 5, 6.

RECORD.

Vide ERROR.

REFERENCE.

1. Where a question of law arises before referees, which is brought before the supreme court, and decided ; they will order a special entry on the record, so as to present the same question to the court of errors. *Gould v. Ogden*, 52
2. An order of referees as to the costs, on postponing the hearing before them, is not a foundation for a rule on the subject, in the supreme court. *Johnson v. Gay*, 54



10. The owners of land adjoining a stream of water where the tide does not ebb and flow, own also the bed of the stream *usque filum aquæ*. *People v. Seymour*, 579

ROADS.

See HIGHWAYS.

S

SALE OF GOODS.

1. Where goods are sold, to be paid for in cash, no time being agreed on for the payment, both the delivery and payment are simultaneous acts; and the vendor may refuse to deliver without actual payment; the latter being a condition of the sale. *Chapman v. Lathrop*, 110
2. But if he deliver without payment, the property passes, and the condition is waived; and though the vendee afterwards refuse to pay, trover will not lie for the goods. *id.*
3. Otherwise, it seems, where they are obtained by the fraudulent contrivance of the vendee. *id.*
4. If the goods be delivered without payment, the vendee may avail himself of a set-off against the vendor. *Per Savage, Ch. J. delivering the opinion of the court.* *id.*
5. If the vendee become bankrupt, the vendor may stop the goods *in transitu*. *Per Savage, Ch. J. delivering the opinion of the court.* *id.*
6. Where, on a sale for ready money, the goods were delivered, but the vendee becoming bankrupt, the money was not paid, yet held by Story, J. that a bill in equity by the vendors, would not lie to compel the personal representatives of the vendee, to account for the proceeds of the goods; on the ground that the sale was conditional as depending on the payment. *Conyers v. Ennis*, 116, note (a)
7. Remarks on the cases in this state holding such sale to be conditional. *id.*
8. On a sale by sample, the vendor is responsible, that the bulk of the commodity shall be equal in quality to the sample. *Andrews v. Kneeland*, 354
9. The plaintiffs, having cotton at three stores in Brooklyn, 69 bales marked G. G. & Co. at the store of B., and 30 of the same mark, at the store of M. & W., sold 66 bales marked G. G. & Co. to the de-

fendants, delivering them a *pro forma* bill of parcels thus: "66 bales, say 19,800 lbs., \$12 per cwt., 1 per cent. off;" the defendants paying at the time, \$1800, in part for the whole. Then the cotton in M. & W.'s store was destroyed by fire, and the defendants demanded of the plaintiffs an order for the 66 bales, which was refused; but the plaintiffs gave an order for 36 bales. These were then weighed by the plaintiffs; and another bill of parcels delivered to the defendants, including the 36 bales, according to the weigh master's bill; and the 30 bales at a certain weight each, with the remark, "deduct, for supposed loss, 150." The 36 bales were delivered at the time of weighing. Held, that the property of the 30 bales did not vest in the defendants; and that, therefore, the plaintiffs could not recover the price. *Rapelye v. Mackie*, 250

10. The 30 bales, not being identified in the contract, and specifically sold, the contract might have been satisfied by a delivery of 30 bales with the mark mentioned, from any other place beside Brooklyn; or, if the contract related to Brooklyn, then out of any other store there, beside M. & W.'s; or, if the contract had been to sell the 30 bales at M. & W.'s; yet they, not being weighed, did not pass. *id.*
11. When something remains yet to be done, as between buyer and seller, or for the purpose of ascertaining either the quantity or price of the article sold, there is no delivery; and the property does not pass, though the price be in part paid. *id.*
12. And so, if there be a part delivery, the other part, not yet ascertained, will not pass. *id.*
13. And there need not be an express agreement, that something farther shall be done. It is enough, that it appear from the circumstances of the case, to be necessary. *id.*

See FACTOR, 1, 2, 3.

SALE AND DELIVERY OF GOODS.

See SALE OF GOODS, 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13.

SALE BY SAMPLE.

See SALE OF GOODS, 8.

SCHOOLS.

Vide COMMON SCHOOLS.

SCIRE FACIAS.

Vide ACTION FOR MONEY HAD AND RECEIVED, 7. EXECUTION, 3.

2. An action for money had and received lies against a sheriff, by one for whom he has collected money on execution. *id.*
 3. It need not be averred in the declaration, specially, that he received the money as sheriff. *id.*
 4. If the sheriff take a promissory note in satisfaction of a *ca. sa.*, and discharge the defendant, without the authority of the plaintiff, it is void as between the sheriff and the maker; and the plaintiff may sue the sheriff for an escape, or take a new execution. But if the plaintiff ratify the transaction, he may charge the sheriff as for money had and received, with interest on the amount from the return day of the *ca. sa.* and then, *semble*, the note becomes valid as between the sheriff and the maker. *id.*
 5. Where the plaintiff interferes, and directs a deputy sheriff to take a course in the collection of an execution, out of the line required by law: as by giving a credit; selling land for less than the execution; and withholding a deed until the whole shall be paid, &c. he thereby makes the deputy his private special agent, and discharges the sheriff. *Gorham v. Gale*, note (a). 467
 6. The motion to issue further execution upon a judgment obtained against a sheriff and his sureties, on a bond given for the faithful execution of his office under the statute, (1 R. L. 421, s. 6,) should be on notice to the sheriff and his sureties. *Lewis v. Ball*, 583
 7. The sureties are not liable beyond the amount of the penalty of the bond. *id.*
- Vide* ATTACHMENT, 3. ESCAPE. PLEAS AND PLEADING, 10, 11.

SHIP'S PAPERS.

By a statute of *England*, a certain amount of repairs in a foreign port takes away the national character of the vessel. *Held*, that repairs being made to less than that amount, did not render it necessary to sail with evidence of the true amount of repairs, as part of the ship's papers. *Francis v. Ocean Ins. Co.*, 404

See EVIDENCE, 17.

SLANDER.

1. In slander, on a motion in arrest of judgment, because the words are not actionable, they must be taken to have been proved as laid, and with the intention imputed by the declaration. *Demarest v. Haring*, 76
2. In slander, words are to be understood, by courts and juries, according to their plain and natural import; according to the ideas they are calculated to convey to those to whom they are addressed. *id.*
3. When doubts arise, the jury are to decide whether the words are used maliciously, and with a view to defame; this being a question of fact, to be collected from all the concomitant circumstances; and the court are to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action. *id.*
4. Courts and juries will understand the words in the same way as other people would. *id.*
5. Words charging the plaintiff with being the father of a bastard child by his sister-in-law, of which she was pregnant; and that he wished the defendant to *make away with it*, are actionable in themselves, as importing a wish that the defendant should destroy the child as soon as born. It imports that the plaintiff applied to him, to commit murder. *id.*
6. To be actionable in themselves, words must impute some act constituting a crime or misdemeanor, for which corporal punishment may be inflicted in a temporal court. *id.*
7. It is a high misdemeanor, for one person to apply to another, and solicit him to commit murder. *id.*
8. Words not actionable in themselves, become so by being spoken of persons in a particular calling or profession; and, *semble*, in any lawful employment by which they may gain a livelihood. *id.*
9. Words imputing incontinency to a clergyman, are within this rule. *id.*
10. Where words may be understood in two different senses, one as imputing a crime, and the other not, it is proper to submit the question how they were understood, to the jury. *id.*
11. *Semb.* That setting forth the plaintiff's character in slander, as that he is a clergyman, and then a slander affecting him in that character, is sufficient, without saying the slander was spoken of him, in relation to that character. And *vid.* the cases cited by *Emmet* and *Oakley*, *arguendo*; last paragraph of their argument, S. P. *id.*
12. In slander for charging the plaintiff with perjury; the defendant, in order to justify by proving the truth of the charge, must

- 1813, *April 5*, Sess. 36, ch. 56, s. 1. (Set-off.) 613
 1813, *April 12*, Sess. 36, ch. 97. (Registry of deeds.) 617
 1818, *March 27*, Sess. 41, ch. 60, s. 2. }
 1825, *April 15*, Sess. 48, ch. 181, s. 6. } (Elec-
 tion of justices in new county. Office of justice.) 642
 1813, *April 5*, Sess. 36, ch. 56, s. 13. (Joint debtors.) 695
 1820, *April 13*, Sess. 43, ch. 202, s. 4. (Canal boats.) 698
 1815, *April 11*, Sess. 38, ch. 153. (Distress for rent in the city of New-York.) 728
 1784, *May 12*, Sess. 7, ch. 64, s. 1, 26. }
 1788, *March 21*, Sess. 11 ch. 90. }
 (Commissioners of Forfeitures.) 751

STOPPAGE IN TRANSITU.

See SALE OF GOODS, 5, 6.

SUPERCARGO.

See INSURANCE, 10.

SURETY.

See APPEAL FROM A JUSTICE'S COURT, 6.
 CHECK, 6, 7, 9. SHERIFF, 6, 7.

SURROGATE.

1. Debt lies on the decree of a surrogate, for the payment of money. *Dubois v. Dubois*, 494
2. Such a decree against an executor for the payment of a legacy, changes the character of the claim into one against the defendant personally. *id.*
3. Hence, in an action of debt on the decree, by the legatee against the executor, the former may declare against, and charge the latter in his own right; and no security need be filed pursuant to the statute, (1 R. L. 314, 15, s. 19.) *id.*
4. And the latter may set off a demand due to him, in his own right, from the plaintiff in his own right. *id.*
5. The surrogate has no authority, as agent for a party, to receive money which he has decreed that another should pay to the party. *id.*
6. Therefore, where the surrogate decreed that *A.* should pay to *B.* a sum of money; and *A.* laid it down on the surrogate's table, who took out a part; and the residue was attached by a constable under process in favor of *A.* against *B.*; *held*, that this was not such a payment as would vest the money specifically in *B.*; and that, therefore, it was not the subject of a levy on an attachment against him. *id.*
7. *Held*, that it was like money collected on execution by an officer, which cannot be levied on by process against the one at whose suit it was collected. *id.*
8. *Held*, also, that the surrogate, having no authority to receive the money, the payment did not satisfy the decree; but an action would still lie upon it. *id.*
9. In debt, on the decree of a surrogate against the defendant, requiring him to pay a legacy, such decree is, in itself, evidence that there was a will; and that the defendant was executor; and, therefore, neither of these facts need be shown by the plaintiff on the trial. *id.*

Vide PLEAS AND PLEADING, 5, 6, 7, 8, 9.

T

TENANTS IN COMMON.

1. Assumpsit will not lie by one tenant in common against another, for repairs to the land, though they be proper or necessary, without a previous request to join in the repairs made and a refusal by the latter. *Mumford v. Brown*, 476
2. Whether even then assumpsit be the proper remedy? *Quere. id.*
3. After an exclusive and uninterrupted possession, by one tenant in common of land, for nearly 40 years, without any interruption with his co-tenants, a jury are authorized to presume an ouster; and an ejectment by his co-tenants, is barred. *Jackson v. Whitbeck*, 638

See GRANT, 8. PARTNERS AND PARTNERSHIP, 4. PLEAS AND PLEADING, 2. WARRANTY, 3.

TENDER OF RENT.

See LANDLORD AND TENANT, 6 to 12.

TIME.

1. Where computation of time in a statute is to be from the date, or from an act done, the day of the date, or act, is exclusive. *Homan v. Liswell*, 659
2. Thus an execution dated the 6th of March, and returnable 30 days from the date, would not expire till after the 6th of April. *id.*

of ejectment, and not been called on by the vendor to pay; and have even acquired title by conveyance from a third person. *Jackson v. Hotchkiss*, 401

See ACTION OF ASSUMPSIT, 5, 6, 7, 8, 9, 10.
ACTION OF COVENANT, 2. AGREEMENT,
1, 2, 3, 4, 10. FIXTURES, 1.

VENIRE.

1. On a plea of *reins per descent*, the venire need not be special. *Roosevelt v. Fulton*, 48
2. Though there be several issues of fact, the venire need not be special. *id.*
3. The venire *tam quam* applies only where there is a demurrer or default, as well as an issue of fact. *id.*

VENUE.

1. The affidavit for a change of venue, should state, that the witnesses, on account of whose place of residence the venue is sought to be changed, are such that, under the advice of counsel, the party cannot safely proceed to trial without them. *Salterlee v. Groot*, 33
2. The affidavit for a motion to change the venue, must state the names of the witnesses. *Anonymous*, 389
3. And also, that, as the party is advised by counsel, and believes, he cannot safely proceed to trial without the testimony of each of them. *id.*
4. Debt on judgment is not a local action; and the venue may be laid in any county in the state, without regard to the place of filing the record, or the venue in the original cause. *Goodrich v. Colvin*, 397
5. To change the venue, in an action for a tort, on the ground that the cause of action arose in a particular county, the affidavit must state, not only that the cause of action arose there, but that it did not arise elsewhere; and this especially of an action for a newspaper libel. *Tillinghast v. King*, 591

VIEW.

The affidavit, on moving for a view, in ejectment, should show not only that boundaries are in question; but the particular circumstances which render a view necessary to the understanding of the cause by the jury; so that the court may judge whether the view be necessary. *Jackson v. Gauger*, 579

VOID PROCESS.

See PROCESS.

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WAGERING POLICY.

See INSURANCE, 7.

WARRANTY.

1. A warranty of lands in a deed in fee, is the subject of a personal action of covenant against the executors of the warrantor; and the grantee is not confined to his voucher or *warrantia charta*, as it seems he was anciently. *Townsend v. Morris*, 123
2. It is sufficient in declaring upon this covenant, to aver generally, that the grantee was evicted of a part or the whole of the granted premises by lawful right and title of a stranger; without setting forth the title or manner of eviction more particularly, especially on generally demurrer. *id.*
3. The damages for an eviction of two tenants in common, to whom lands are granted with warranty, are personal; and an action will lie for them by the survivor. *id.*

WARRANTY OF GOODS.

Vide SALE OF GOODS, 8.

WASHINGTON AND WARREN BANK.

1. Insolvency and refusal to pay bills, &c. in specie, or other lawful money, on demand, &c. are not, of themselves, within the act, (*sess. 40, ch. 185*), incorporating The President, Directors and Company of the Washington and Warren Bank, as a ground for an information in *quo warranto*, or other proceeding against them of their corporate rights. *People v. Washington and Warren Bank*, 217
2. To work such forfeiture, there must be a total nonuser. Per *Woodworth, J.* *id.*
3. The statute, (*sess. 48, ch. 325, s. 6*), passed April 1, 1825, is prospective in its operation as to the causes of forfeiture; but not exclusively so as to the remedy. *id.*

WILL.

1. B. devised his real estate to his four children, in fee, in four separate parcels; and provided that if any of them should die without issue of their body or bodies, lawfully begotten, the share of the deceased should be equally divided between the survivors. Two having died with, and one

7. The inhabitants of *Lloyd's Neck* claimed by prescription, an exclusive right of fishing for oysters, opposite their respective farms in an arm of the sea. In an action of trespass by one of them, for a violation of this claim, another, interested as a remainderman in a farm adjoining the *locus in quo* at *Lloyd's Neck*, was offered as a witness for the plaintiff; *held*, that he was admissible. *Gould v. James*, 309.
8. The inhabitants of *H.* claimed that the *locus in quo*, was a free fishery for them. The defendant, however, an inhabitant of *H.* justified by plea, on the ground that it was a free fishery for all the citizens of this state; *held*, that other inhabitants of *H.* were competent witnesses; and that, too, though they had fished at *Lloyd's Neck*; and were liable to an action, if the plaintiff should succeed in establishing his right. *id.*
9. These witnesses had an interest in the question merely; not in the event of the cause. *id.*
10. A commoner cannot be a witness to support the right of his fellow commoner; but one may be a witness to support a right by prescription, in respect to another's estate, though the witness claim to prescribe in respect to his own estate, upon the same facts he is called to establish. *id.*
11. A citizen of this state is a competent witness to establish a public right of fishery in all the citizens of the state. *id.*
12. An inhabitant of a particular place, cannot be a witness, to prove a prescriptive right, common to all the inhabitants of that place. *id.*
13. In trespass *quare clausum fregit*, against one, other trespassers on the *locus in quo*, or in other places, the title to which depends on the same question as that to the *locus in quo*, may be witnesses for the defendant; for the verdict will not be evidence for or against them. *id.*

Vide ACTION OF TRESPASS, 1. CHECK, 3,

4. INSOLVENT, 1.

WRIT OF ERROR.

See ERROR, WRIT OF.

WRIT OF REPLEVIN.

See REPLEVIN, 5, 6.

WRIT OF RESTITUTION.

See ACTION FOR MONEY HAD AND RECEIVED, 7.

END OF VOLUME SIXTH.

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